



# San Francisco Law Library

No. 126193

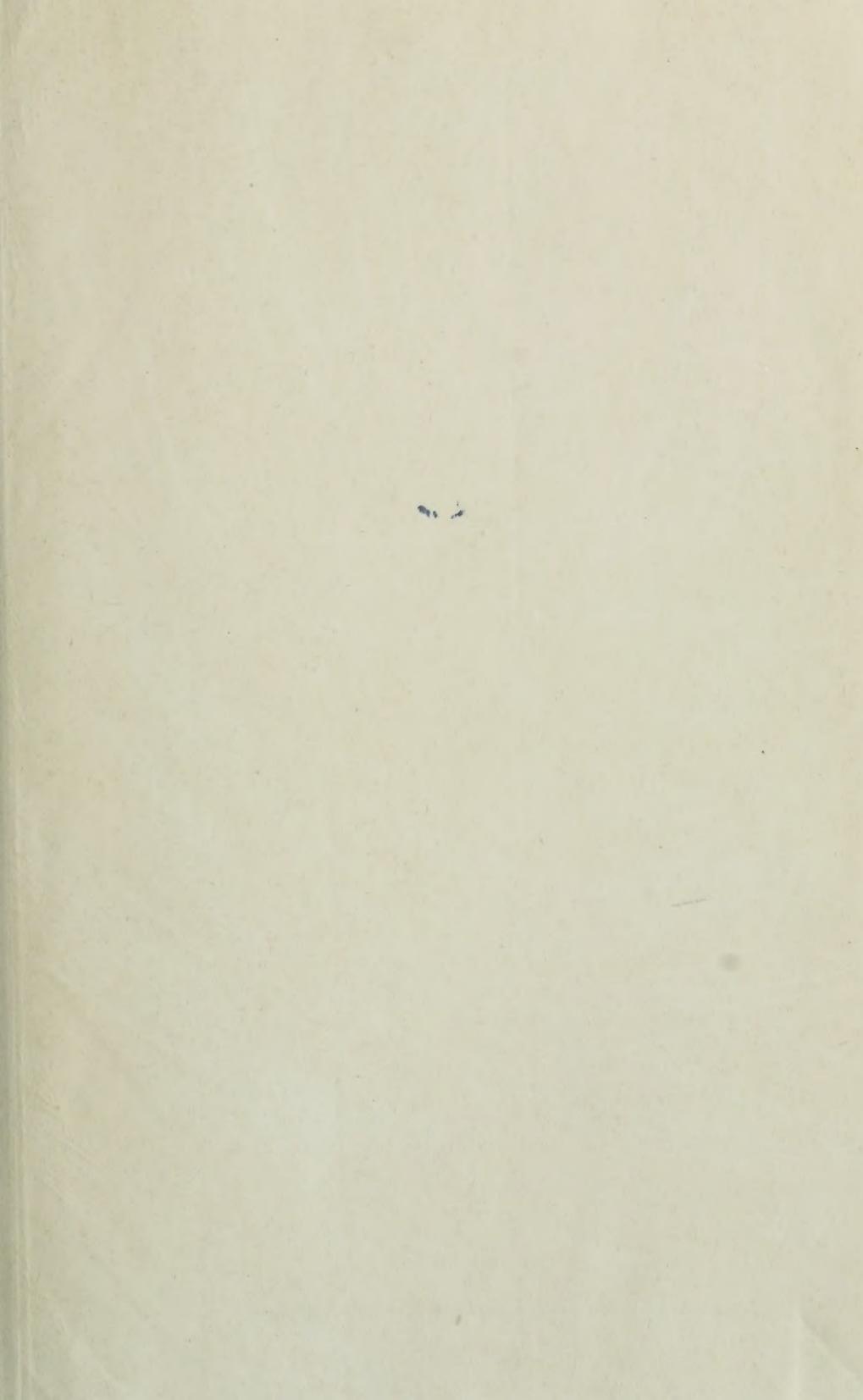
---

---

#### EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.





No. 10972

2406

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

GEORGE CLAYTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record  
In Two Volumes  
VOLUME I  
Pages 1 to 264

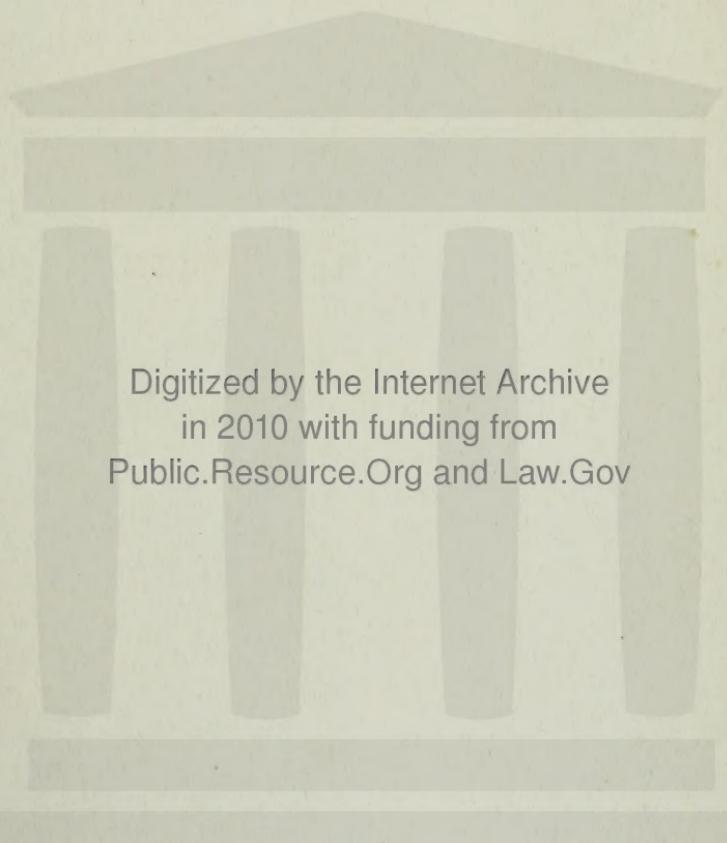
Upon Appeal from the District Court of the United States  
for the Eastern District of Washington,

Northern Division

FILED

JUL 11 1945

PAUL P. O'BRIEN,  
Rotary Colorprint, 661 Howard Street, San Francisco  
CLERK



Digitized by the Internet Archive  
in 2010 with funding from  
Public.Resource.Org and Law.Gov

No. 10972

---

United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

GEORGE CLAYTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record  
In Two Volumes  
VOLUME I  
Pages 1 to 264

---

Upon Appeal from the District Court of the United States  
for the Eastern District of Washington,  
Northern Division



## INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Appeal:	
Bail Bond Pending Determination of . . . . .	33
Certificate of Clerk to Transcript of Rec- ord on . . . . .	92
Notice of . . . . .	26
Order Fixing Bond on . . . . .	32
Order of Extension of Time for Settle- ment and Filing of Bill of Exceptions, etc., on . . . . .	36
Praecipe for Transcript of Record on . . . . .	90
Statement of Points and Designation of Record on . . . . .	524
Bill of Exceptions . . . . .	94
Transcript of Testimony . . . . .	94
Opening Statement . . . . .	95
Witnesses for Defendant:	
Berkey, Harrison N.	
—direct . . . . .	449
—cross . . . . .	451
Clayton, Amanda Victoria	
—direct . . . . .	465

		Page
<b>Witnesses for the Defendant—(Contd.)</b>		
<b>Clayton, George</b>		
—direct .....	403	
—cross .....	429	
—redirect .....	445	
—recross .....	447	
—recalled .....	451	
—recalled, cross .....	461	
—redirect .....	464	
<b>Deckelman, Arthur</b>		
—direct .....	396, 401	
—voir dire .....	400	
—cross .....	401	
<b>Doores, Robert</b>		
—direct .....	467, 479	
—cross .....	478, 480	
—redirect .....	491	
—by the Court .....	491	
—recross .....	493	
<b>Witnesses for Plaintiff:</b>		
<b>Barry, Roy O.</b>		
—direct .....	318	
—cross .....	321	
<b>Bezona, Wayne</b>		
—direct .....	339	
—recalled, direct .....	385	
<b>Buchholz, Jesse S.</b>		
—direct .....	332	
—cross .....	336	

Index	Page
Witnesses for Plaintiff—(Contd.)	
Campbell, E. H.	
—direct .....	290
—cross .....	294
Campbell, George	
—direct .....	337
Cook, Edna	
—direct .....	277
—cross .....	280
Doores, Shirley	
—direct .....	363
Doores, Wesley	
—direct .....	137
—cross .....	153
—recalled, cross .....	342, 365
—redirect .....	372
—recross .....	376
—redirect .....	377
Erickson, Erick R.	
—direct .....	271
—recalled, direct .....	283
Graben, W. G.	
—direct .....	363
Hay, Edward T.	
—direct .....	259
Hegler, George	
—direct .....	357

Index	Page
Witnesses for Plaintiff—(Contd.)	
Hobbs, John F.	
—direct .....	379
—cross .....	383
—redirect .....	384
Hocum, L. H.	
—direct .....	265
Kellmer, R. D.	
—direct .....	388
Kelly, Edward William	
—direct .....	100
—cross .....	126
—recalled, redirect .....	180
—recalled, cross .....	394
Knowlton, W. R.	
—direct .....	274
Langs, Percy M.	
—direct .....	298
—cross .....	304
—by the Court .....	313
—redirect .....	313
Markoson, M. W.	
—direct .....	314
—cross .....	315
—redirect .....	317
—recross .....	317

**Index****Page**

## Witnesses for Plaintiff—(Contd.)

McHargue, Nora	
—direct .....	324
—cross .....	331
—redirect .....	332
Pool, W. G.	
—direct .....	322
—cross .....	324
Setters, Esther	
—direct .....	287
—cross .....	289
Smith, Samuel D.	
—direct .....	358
Soth, W. P.	
—direct .....	356
Stevenson, Vern	
—direct .....	267
—cross .....	269
—redirect .....	271
Stommell, H. P.	
—direct .....	263
Teed, Dr. E. H.	
—direct .....	189
—cross .....	216
—redirect .....	257
—recross .....	258
—recalled, direct .....	276

	Index	Page
Assignments of Error, Defendant, George Clayton .....		513
Bail Bond Pending Determination of Appeal .....		33
Certificate of Clerk to Transcript of Record on Appeal .....		92
Certificate of Trial Judge .....		512
Errors in Law Occurring at the Trial .....		17
<b>Exhibits for Defendant:</b>		
A—Letter, May 24, 1944, W. J. Graven to Dr. Teed .....		81
B—Letter, February 2, Bunny to Shirley and Excerpts for Testimony of Wesley Doores .....		81
D—Warranty Deed, Clayton to Doores...		84
E—Warranty Deed, Doores to Clayton...		86
F—Warranty Deed, Clayton to Doores...		89
<b>Exhibits for Plaintiff:</b>		
1—Prescription—1-1-44, Mrs. Velma Rock		37
2—Prescription—1-27-44, Mrs. Velma Rock		38
3—Prescription—2-3-44, Mr. Mike Sanders		39
4—Prescription—12-30-43, Mrs. Velma Rock		40
5—Prescription—1-24-44, Mr. Mike Sanders		41
6—Prescription—2-9-44, Mrs. Velma Rock		42
7—Prescription—2-17-44, Mr. Mike Sanders		43

## Index

## Page

## Exhibits for Plaintiff—(Contd.)

Index	Page
Exhibits for Plaintiff—(Contd.)	
8—Prescription—2-23-44, Mr. Mike Sanders	44
9—Prescription—3-5-42, Mr. Mike Sanders	45
10—Prescription—3-14-44, Mr. Mike Sanders	46
11—Prescription—3-22-44, Mr. Mike Sanders	47
12—Prescription—3-18-44, Mr. Mike Sanders	48
13—Prescription—4-1-44, Mr. Mike Sanders	49
14—Prescription—4-3-44, Mr. Mike Sanders	50
15—Prescription—4-6-44, Mr. Mike Sanders	51
16—Prescription—4-8-44, Mr. Mike Sanders	52
18—Telegram—5-27-44, Dr. E. H. Teed, from Shirley Clayton .....	53
19—Ledger Card of Georgia Cook or Edna E. Cook, First Federal Savings and Loan Association, No. 19248.....	54
20—Ledger Card of Edna E. or Georgie Cook, First Federal Savings and Loan Association, No. 15590 .....	55
21—Ledger Card of Georgia or Edna E. Cook, First Federal Savings and Loan Association, No. 19248.....	56
22—Check, dated April 24, 1944, Account No. 19248, to Edward H. Teed.....	57
23—Check, dated April 7, 1944, Account No. 19248, to Edward H. Teed.....	58

## Index

## Page

## Exhibits for Plaintiff—(Contd.)

	Page
26—Record of Telephone Call April 20, 1944	59
27—Ledger Card of Edna E. or Georgie Cook, Spokane Branch of Seattle First National Bank of Spokane, No. 166213	60
28—Application for Cashier's Checks or Bank Drafts, April 7, 1944 .....	61
29—Ledger Card, Edna E. Cook, Spokane Branch of Seattle First National Bank, Spokane, No. 166213 .....	61
30—Cashier's Check, dated April 7, 1944, Paid to Edward H. Teed .....	62
31—Ledger Card of Geo. T. Clayton, The Old National Bank of Spokane.....	63
32—Deposit Slip, May 1, 1944, Geo. T. Clay- ton .....	64
33—Deposit Slip, April 12, 1944, Geo. T. Clayton .....	64
34—Hotel Registration Card .....	65
36—Deposit Slips (15) Geo. T. Clayton....	66
37—Signature Card of Geo. T. Clayton....	70
38—U. S. Internal Revenue Order Form for Narcotics, dated 5/26/44 .....	71
39—Order for Narcotics dated 4/24/44....	73
40—Borrower's Liability Card, Nord-Clay- ton .....	74

Index	Page
Exhibits for Plaintiff—(Contd.)	
41—Sales Slip, Davenport and Chair, April 10, 1944 .....	75
44—Contract, Receipt, etc., for Safe Deposit Box .....	76
45—7 Slips re Access to Safe Deposit Box	77
46—Record of Moneys in Case United States vs. Shirley Doores .....	79
Indictment .....	2
Judgment and Commitment .....	14
Minute Orders:	
August 16, 1944, and December 4, 1944— Pleas of Wilma Shirley Doores and George Clayton .....	12
January 19, 1945—Order to Appear Be- fore the Court .....	35
Motion for New Trial .....	16
Motion in Arrest of Judgment .....	15
Names and Addresses of Attorneys of Record	1
Notice of Appeal of George Clayton.....	26
Opinion of the Court .....	19
Order Denying Motion for New Trial.....	24
Order Fixing Bond .....	32
Order of Extension of Time for Settlement and Filing of Bill of Exceptions, etc.....	36

Index	Page
Pleas of Wilma Shirley Doores and George Clayton .....	12
Praecipe for Transcript of Record.....	90
Statement of Points and Designation of Record on Appeal .....	524
Verdict .....	13

**NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD:**

**ROBERTSON AND SMITH,**

Spokane & Eastern Bldg.  
Spokane, Washington

**HAROLD M. GLEESON,**

Sherwood Building,  
Spokane, Washington

**EDWARD M. CONNELLY,**

United States District Court  
334 Federal Building,  
Spokane, Washington

In the District Court of the United States  
for the Eastern District of Washington  
Northern Division

No. C-7702

UNITED STATES OF AMERICA

Plaintiff,

vs.

WILMA SHIRLEY DOORES,  
EDWARD WILLIAM KELLY, and  
GEORGE CLAYTON,

Defendants.

INDICTMENT

VIO: Sections 76, 88, Title 18 U.S.C.A.

The Grand Jurors of the United States of America for the Eastern District of Washington, duly impaneled, sworn and charged to inquire into and concerning the commission of crime within said District, upon their oaths do find, charge and present:

COUNT ONE

That Wilma Shirley Doores, Edward William Kelly, and George Clayton, in Spokane County and within the jurisdiction of the Northern Division of the United States District Court for the Eastern District of Washington, commencing some time shortly prior to April 9, 1944, the exact date being to the Grand Jurors unknown, and continuing thereafter to on or about May 25, 1944, did willfully, unlawfully and feloniously conspire, combine,

confederate and agree together, and each with the other and each with diverse other persons to the Grand Jurors unknown, to commit crimes and offenses against the United States as follows, to-wit: To violate Title 18, Section 76, U.S.C.A. in the following manner and by the following means:

That the said defendants did conspire, combine and agree that the defendant Edward William Kelly, with intent on the part of each of said defendants to defraud one Dr. E. H. Teed of Coeur d'Alene, Idaho, a practicing physician of that city, of money and narcotic drugs, would falsely assume and pretend to be an officer acting under the authority of the United States, to-wit, an inspector and officer of the Narcotics Division of the United States of America, and that the said defendant Edward William Kelly would take upon himself to falsely act as such inspector and officer of the Narcotics Division of the Treasury Department of the United States of America, and in such pretended character as such officer would threaten to arrest the said Dr. E. H. Teed for unlawfully disposing of narcotic drugs, which the defendant, Wilma Shirley Doores, [1\*] would induce the said Dr. E. H. Teed to unlawfully sell and dispose of to her, the said money and narcotic drugs so to be fraudulently obtained from the said Dr. E. H. Teed were intended by said defendants to be secured from the said Dr. E. H. Teed by the said defendant Wilma Shirley Doores in consideration of the said

\*Page numbering appearing at foot of page of original certified Transcript of Record.

Edward William Kelly, while acting in his pretended capacity as a narcotics agent of the Treasury Department of the United States, failing to arrest, apprehend or institute prosecution against the said Dr. E. H. Teed for unlawfully selling and disposing of narcotics to the said defendant Wilma Shirley Doores. That in pursuance of the said unlawful conspiracy hereto described, the said defendants did knowingly, willfully, unlawfully and feloniously do and perform the following overt acts, to-wit:

#### OVERT ACTS

1. That the said Wilma Shirley Doores on several occasions prior to April 10, 1944, did secure from the said Dr. E. H. Teed, in an illegal manner and in violation of law, certain quantities of narcotics.
2. That the said Edward William Kelly on various occasions, commencing April 10, 1944 and ending on May 18, 1944, did represent to the said Dr. E. H. Teed of Coeur d'Alene, Idaho, that he was an inspector and officer of the Narcotics Division of the Treasury Department of the United States of America, and as such was acting under the authority of the United States and of the Treasury Department.

3. That the said Edward William Kelly, on or about April 16, 1944, did represent to the said Dr. E. H. Teed that he had heard that the said Dr. E. H. Teed, was selling and disposing of narcotics to the said Wilma Shirley Doores, and to others,

in a manner contrary to the laws of the United States, and that he was ready to arrest the said Dr. E. H. Teed and would return later on the same day for the purpose of effecting the arrest of the said Dr. E. H. Teed.

4. That the said defendant Wilma Shirley Doores on or about the 17th day of April, 1944, did represent to the said Dr. E. H. Teed that she was acquainted with the said Edward William Kelly, and did further falsely represent that she knew him, the said defendant Edward William Kelly, to be a Narcotics Inspector of the Treasury Department of the United States of America, and further falsely represented that the said defendant Edward William Kelly could be fixed, meaning that he could be bribed to forbear the performance of his duty, and that she had bribed him in Seattle in behalf of another doctor, in- [2] duing said Seattle doctor to pay defendant Edward William Kelly a substantial sum of money. That the defendant Wilma Shirley Doores further falsely represented to Dr. E. H. Teed that if he would provide a substantial sum of money, to-wit, \$2500, for the purpose of paying the same to the said Edward William Kelly, she could prevail upon the said Edward William Kelly to forbear from arresting the said Dr. E. H. Teed. That the said Wilma Shirley Doores did accept from Dr. E. H. Teed the sum of \$2500 which he had paid to her on the condition that the said money was to be paid to the said Edward William Kelly in consideration of the said defendant Edward William Kelly's

refusing to arrest the said Dr. E. H. Teed for furnishing her, the said Wilma Shirley Doores, with narcotics.

5. That the said Wilma Shirley Doores did thereafter accept and receive various sums of money from the said Dr. E. H. Teed on the pretense that she would pay the said money to the said Edward William Kelly and other narcotics agents for their forbearance in arresting the said Dr. E. H. Teed for violation of the Federal narcotics laws.

6. That on April 22, 1944, the said Wilma Shirley Doores, did induce Dr. E. H. Teed to pay to her at Spokane, Washington the sum of \$3000 upon the representation by her that she would prevail upon Edward William Kelly and Mr. Bangs, Chief of the Narcotics Division of the Treasury Department of the United States to forbear from arresting the said E. H. Teed upon a charge of unlawfully furnishing her, the said Wilma Shirley Doores, with narcotics.

7. That on April 24, 1944, the said Wilma Shirley Doores did prevail upon Dr. E. H. Teed to pay to her at Spokane, Washington, the sum of \$3500 and to give to her 1000 quarter grain tablets of morphine sulphate, a narcotic drug, upon the representation of the said Wilma Shirley Doores that she would prevail upon the said Edward William Kelly and one Mr. Bangs, Chief of the Narcotics Division of the Treasury Department of the United States, to forbear from arresting the said Dr. E. H. Teed upon a charge of unlawfully

furnishing her, the said Wilma Shirley Doores, with narcotics.

8. That on or about April 14, 1944, the said Wilma Shirley Doores did telegraph the said Dr. E. H. Teed from Spokane, Washington, to Hailey, Idaho, requesting that the said Dr. E. H. Teed immediately contact her by long distance telephone at Spokane, Washington. That he did so contact her by long distance telephone and she told him that if he did not come to Spokane [3] and "fix things up" he would be arrested.

9. That on or about May 16, 1944, the said defendant Edward William Kelly, while he was impersonating a Federal Narcotics Inspector of the Treasury Department of the United States, did receive from the said Dr. E. H. Teed the sum of \$145.

10. That on or about the 10th day of April, 1944, the said defendant Wilma Shirley Doores paid to the said defendant Edward William Kelly the sum of \$200, being a portion of the \$2500 which she had received from the said Dr. E. H. Teed of Coeur d'Alene, Idaho, for the purpose of bribing the said Edward William Kelly, a purported narcotics inspector, from the performance of his purported duty to arrest the said Dr. E. H. Teed for unlawfully disposing of narcotics to the defendant Wilma Shirley Doores.

11. That between April 9, 1944 and May 25, 1944 the defendant Wilma Shirley Doores gave to the defendant George Clayton approximately \$3000 in cash which he, the said George Clayton, knew had

been unlawfully received from the said Dr. E. H. Teed of Coeur d'Alene, by the defendant Wilma Shirley Doores on the pretense that she, the said Wilma Shirley Doores, could prevent a purported narcotics inspector, impersonated by the said Edward William Kelly, from arresting the said Dr. E. H. Teed for unlawfully disposing of narcotics;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

## COUNT TWO

That the said defendant Edward William Kelly, in the County of Spokane, State of Washington, in the Northern Division of the Eastern District of Washington and within the jurisdiction of the above-entitled Court, then and there being, did willfully, unlawfully and feloniously, with intent to defraud one Dr. E. H. Teed of Coeur d'Alene, Idaho, on or about April 10, 1944, falsely assume and pretend to be an officer and inspector of the Narcotics Division of the Treasury Department of the United States and did take upon himself to act as such Narcotics Inspector, and in such pretended character did demand and obtain from the said Dr. E. H. Teed the sum of \$145 as a purported bribe for failing and refusing to arrest the said Dr. E. H. Teed for unlawfully disposing of narcotic drugs, which said act was a part of the scheme to defraud Dr. E. H. Teed as alleged and described in Count One of this indictment:

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. [4]

### COUNT THREE

That the said defendant Wilma Shirley Doores, on or about April 10, 1944, in the County of Spokane, State of Washington, in the Northern Division of the Eastern District of Washington, and within the jurisdiction of the above-entitled Court, then and there being, did willfully, unlawfully and feloniously aid, abet and assist the defendant Edward William Kelly to assume and pretend to be a narcotics inspector of the Treasury Department of the United States, and acting under the authority of the United States, for the purpose of and with intent to defraud one Dr. E. H. Teed into paying money and other valuable things by frightening the said Dr. E. H. Tweed into paying money on consideration of the said defendant Edward William Kelly forbearing to exercise his pretended authority as a narcotics inspector of the Treasury Department of the United States in pretending to refuse to arrest the said Dr. E. H. Teed upon a charge of unlawfully disposing of narcotics to the said Wilma Shirley Doores:

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

## COUNT FOUR

That the said defendant Wilma Shirley Doores, on or about May 20, 1944, in the County of Spokane, State of Washington, in the Northern Division of the Eastern District of Washington and within the jurisdiction of the above-entitled Court, then and there being, did willfully, unlawfully and feloniously aid, abet, assist, counsel and procure the said defendant Edward William Kelly to falsely assume and pretend to be a narcotics inspector of the Treasury Department of the United States, and acting under the authority of the United States, and in such pretended character to demand and obtain from the said Dr. E. H. Teed money of the value of \$145;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

## COUNT FIVE

That the said defendant Wilma Shirley Doores, on or about April 20, 1944, in the County of Spokane, State of Washington, in the Northern Division of the Eastern District of Washington, and within the jurisdiction of the above entitled Court, then and there being, with intent to extort money from the person of the said Dr. E. H. Teed, did willfully, unlawfully and feloniously transmit in interstate commerce, to-wit, by means of the interstate long distance telephone from the said defendant Wilma Shirley Doores, at Spokane, [5] Wash-

ington to Dr. E. H. Teed at Hailey, Idaho, a threat to accuse the said Dr. E. H. Teed of the 'crime of unlawfully selling and disposing of narcotics to her, the said defendant Wilma Shirley Doores unless he would pay to her money for delivery to a certain pretended narcotics agent, to-wit, the defendant Edward William Kelly;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Dated this 11th day of August, 1944.

HOWARDD C. CLEAVINGER  
United States Attorney  
HARVEY ERICKSON  
Assistant United States  
Attorney

A True Bill:

EDWARD C. CLEAVINGER  
Foreman, Grand Jury

Presented to the Court by the Foreman of the Grand Jury, in open Court, in the presence of the Grand Jury and filed in the United States District Court for the Eastern District of Washington,  
Aug. 11, 1944.

A. A. LaFRAMBOISE,  
Clerk

(Excerpt from Court Journal 16, page 534. Title of cause.)

**PLEAS****WILMA SHIRLEY DOORES**

Now on this 16th day of August, 1944, into court comes the defendant Wilma Shirley Doores with her attorney Harold Gleeson, waives formal arraignment under the Indictment heretofore filed against her, and being interrogated by the Court as to her plea thereto, defendant answers that she desires to enter a plea of Not Guilty, which plea is received by the Court and ordered entered on the records of the court with the understanding that it may be withdrawn for the purpose of filing a demurrer and motions on or before August 23, 1944. If motions are filed, arguments will be heard August 30, 1944, at 10:00 A. M.

**GEORGE CLAYTON**

Now on this 16th day of August, 1944, into court comes the defendant George Clayton with his attorney Del Cary Smith, waives formal arraignment under the Indictment heretofore filed against him, and being interrogated by the Court as to his plea thereto, defendant answers that he desires to enter a plea of Not Guilty, which plea is received by the Court and entered on the records of the [6] court with the understanding that it may be withdrawn for the purpose of filing a demurrer and motions on or before August 23, 1944. If motions are filed,

arguments will be heard August 30, 1944, as 10:00 A. M.

(Excerpt from Court Journal 16, Page 650. Title of cause.)

Now on this 4th day of December, 1944, into court comes the defendant Wilma Shirley Doores, with her attorney Harold Gleeson and moves the court for leave to withdraw her plea of Not Guilty heretofore entered to the Indictment. Motion Granted. Upon being interrogated by the Court as to her plea at this time, defendant answers that she desires to enter a plea of Guilty as to Counts 1, 3, 4 and 5 of the Indictment, which plea is received by the Court and ordered entered on the records of the court.

Continued for imposition of sentence to Friday, December 8, 1944, at 3:40 P. M.

---

[Title of Court and Cause.]

### VERDICT

We, the jury in the above entitled cause, find the defendant George Clayton, Guilty as charged in Count I of the Indictment.

REX J. RAYMOND  
Foreman.

[Endorsed]: Filed December 12, 1944.

[Title of Court and Cause.]

### JUDGMENT AND COMMITMENT

Criminal Indictment in five counts for violation of U.S.C., Title 18 Secs. 76 and 88 (Count 1 only applies to this defendant).

On this 11th day of December, 1944, came the United States Attorney, and the defendant George Clayton appearing in proper person, and by his attorney Del Cary Smith and,

The defendant having been convicted on the verdict of the jury of the offense charged in Count 1 of the Indictment in the above entitled cause, to wit: conspiracy to extort, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It [7] Is By the Court Adjudged that defendant is guilty as charged in Count 1 of the Indictment, and it is further

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of

Two (2) Years and pay a fine of \$5000.00 and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer

and that the same shall serve as the commitment herein.

L. B. SCHWELLENBACH

United States District Judge

[Endorsed]: Filed December 11, 1944.

---

[Title of Court and Cause.]

**MOTION IN ARREST OF JUDGMENT**

Comes now the defendant and moves the Court to arrest judgment on the verdict of the jury in the above-entitled case for the following causes:

1. No legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the Court.
2. That the facts as stated in the indictment do not constitute a crime.

Defendant also moves for arrest of judgment upon the ground that the indictment in the above case charged that the defendants conspired, combined, and agreed together and each with the other "to commit crimes and offenses against the United States as follows, to-wit: to violate Title 18 Section 76, U.S.C.A., in the following manner", etc., and there was no creditable evidence that the defendant was guilty of said offense or of any offense.

Defendant also moves for an arrest of judgment on the ground that there was no proof of any overt act in furtherance of said conspiracy, particularly overt act No. 11 charged against said defendant.

This motion is based upon the records and files of the above-entitled [8] case, upon the minutes of the Court, and upon the proceedings and testimony in the above-entitled case.

ROBERTSON & SMITH  
HAROLD M. GLEESON  
Attorneys for Defendant

Copy received this 13th day of December, 1944.  
EDWARD M. CONNELLY  
U. S. Atty.

[Endorsed]: Filed December 13, 1944.

---

[Title of Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant and moves the Court to vacate and set aside the verdict in the above-entitled case and to grant the defendant a new trial upon the following grounds:

I.

Irregularity in the proceedings of the jury, by which defendant was prevented from having a fair trial.

II.

Misconduct of the jury.

III.

Newly discovered evidence material for the defendant which he could not have discovered with reasonable diligence and produced at the trial.

IV.

Accident or surprise.

V.

Errors of law occurring at the trial and excepted to by the defendant.

VI.

Insufficiency of the evidence to justify the verdict and that it is contrary to the law and evidence.

VII.

Misconduct of the District Attorney in argument to the jury.

**ERRORS IN LAW OCCURRING AT  
THE TRIAL**

The claimed errors in law were as follows:

1. In permitting the United States Marshal to testify to certain acts and things done after the alleged conspiracy had terminated, particularly to the recovery of certain monies from the safety deposit box rented under an [9] assumed name by the defendant Shirley Doores.

2. In failing to grant defendant's motion for dismissal made at the end of the Government's case on account of the insufficiency of the evidence, the contradictory nature thereof, and the fact that there was no credible proof of the existence of a conspiracy.

3. In failing to grant defendant's motion for a direct verdict or dismissal at the end of all of the testimony in the case on the ground of the insuffi-

ciency of the evidence, the contradictory nature of the testimony of the Government, and upon the further fact that all circumstances relied upon by the Government were such circumstances as to be susceptible of two constructions and the Court was required as a matter of law to find that such circumstances indicated innocence rather than guilt on the part of the defendant.

4. In sustaining the objection of plaintiff's counsel to the cross-examination of the witness Kelly upon what disposition he had made of the one hundred quarter grains of morphine which he had received from Government witness Dr. E. H. Teed.

5. Misconduct of the District Attorney in argument, duly objected and excepted to at the time, as will be more fully shown by transcript of the testimony and argument hereafter to be filed.

6. In further instructing the jury upon the subjects of conspiracy and circumstantial evidence at the request of plaintiff's attorney and over the objection of defendant after the jury had been fully and completely instructed upon said subjects, thereby serving to emphasize in the jury's mind said instructions and, further, to weaken the instructions as given by the Court, to the prejudice of the defendant.

This motion is based upon the records and files of the above-entitled case, upon the minutes of the Court, upon the proceedings and testimony at the trial, and upon affidavits to be filed herein.

ROBERTSON & SMITH

HAROLD M. GLEESON

Attorneys for Defendant

Copy received this 13th day of December, 1944.  
EDWARD M. CONNELLY,  
U. S. Atty.

[Endorsed]: Filed December 13, 1944. [10]

---

In the District Court of the United States for the  
Eastern District of Washington, Northern  
Division

No. C-7702

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILMA SHIRLEY DOORES,  
EDWARD WILLIAM KELLY, and  
GEORGE CLAYTON,

Defendants.

#### OPINION OF THE COURT

Schwellenbach, District Judge.

The defendant Clayton was charged jointly with the defendants Shirley Doores and Edward Kelly with conspiracy to extort by the technique of the impersonation of a Federal Narcotics Officer. Defendants Doores and Kelly pleaded guilty prior to trial but were not sentenced at the time of trial. Kelly testified at length for the Government. Doores was called by the Government and was asked only one question. The trial resulted in a verdict

of guilty as to Clayton. He moved for a new trial on several grounds, the disposition of only one of which remains to be made. He contends that the Court erred prejudicially by permitting the United States Attorney to comment on the defendant's failure to call Shirley Doores to testify generally concerning the conspiracy charge. [11]

The testimony showed that Clayton and Shirley Doores had lived together for about five years and were living together at the time of the trial. Miss Doores was on bail during the trial. Their relationship was politely referred to during the trial as that of common law husband and wife although the State of Washington recognizes no such relationship. Shirley Doores was admittedly a drug addict. The Government's contention was that early in 1944 she had acquired a large quantity of drugs from a Dr. Teed, of Coeur d'Alene, Idaho, and that after Teed refused further drugs she and Kelly and Clayton conspired together to have Kelly impersonate a Federal officer and threaten Teed and that, as a result of such threats, Shirley Doores extorted some fourteen thousand dollars (\$14,000) out of Teed, part of which was turned over to Clayton. Testimony in support of this contention was submitted by the Government through Kelly and Shirley Doores' brother "Bunny." Clayton took the stand in his own defense and categorically denied any knowledge of the conspiracy. In final argument, the United States Attorney commented on defendant's failure to call Shirley Doores and stated that Shirley, who had pleaded guilty, "would

not lie for anyone." Timely objections were made. I did not instruct the jury to disregard the remark.

There was nothing inflammatory about the remark or the manner of its utterance which would bring it within the rule recently enunciated in *Viereck v. United States*, 318 U. S. 236. According to the standard laid down in *Tatum v. United States*, 9th Cir., decided December 11, 1944, defendant cannot complain of the language used. The question involved is whether the argument injected an unfair inference in view of the situation existing concerning Shirley Doores at the time. [12]

The rule is that if the party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. *Graves v. United States*, 150 U. S. 118, 121; *United States v. Cotter*, 2d Cir., 60 F. (2d) 689, 691, certiorari denied, 287 U. S. 666; *Milton v. United States*, 110 F. (2d) 556, 559. There can be no question that Shirley Doores was not only accessible to the defendant as a witness, but was peculiarly available to him as a witness against the Government. She was living with him. She had lived with him for five years. Her counsel, who represented her in these proceedings, was co-counsel for the defendant Clayton. At the time that Doores was called as a witness for the Government, this counsel stated, in the absence of the jury, that it had not yet been determined whether Shirley Doores would be called by the defendant. Under those

circumstances, the Government would not have dared to have called her as a witness as to the issues generally. This was clearly a case of peculiar availability so far as the defendant was concerned.

The difficulty in this case arises out of the decision of the 9th Circuit Court of Appeals in *Moyer v. United States*, 78 F. (2d) 624, 630. In that case, the Court instructed the jury concerning the presumption arising out of the failure to call available witnesses. The witness referred to there was not peculiarly available to the defendant. In fact, the defendant testified he was only slightly acquainted with him. However, the case was reversed on the basis of the instruction. The court, through Judge Norcross, used the following language: "The rule we think should not be applied in the case of one who [13] is a codefendant, and has entered a plea of guilty, and as to whom sentence has not been imposed."

Had the Circuit Court of Appeals stopped there, I would feel compelled to grant a new trial here. I assume that my failure to instruct the jury to disregard the argument concerning the inference is tantamount to an affirmative instruction explaining the inference. *Graves v. United States*, *supra*. However, the Circuit Court of Appeals went on to say: "Of one in that position the Supreme Court in *Alford v. United States*, *supra*, (282 U. S. 667) said: 'Nor is it material, as the Court of Appeals said, whether the witness was in custody because of his participation in the transactions for which petitioner was indicted. Even if the witness were

charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross examination that his testimony was affected by fear or favor growing out of his detention. . . .'" Thus, the Court, in the Moyer case, demonstrated that its reason for excluding the rule in the case of unsentenced codefendants was its belief that the testimony of such unsentenced codefendants might be affected by fear or favor growing out of the detention. No such reason can exist in this Court. On assuming my position of judge of this Court a little over four years ago, I announced a policy which invariably has been followed—that is, that the United States attorney has nothing to do with the sentences imposed by the Court. I do not seek the advice of the United States attorney as to the sentence. I do not permit him to give advice either publicly or privately. Defendant Clayton was represented by two very capable and experience lawyers, each of whom has represented defendants in this [14] Court many times in the last four years. They were entirely familiar with the rule. They and the defendant and Shirley Doores knew that she had nothing to fear and she could expect no favors as a result of her testimony had she taken the stand. Since the reason which actuated the Circuit Court of Appeals to lay down the rule is non-existent here, I do not feel constrained to follow it.

Furthermore, in an additional paragraph in the Moyer decision, the Court specifically points out

that the witness to whom reference was made was equally accessible to both the prosecution and the defendant and that, therefore, no unfavorable inference could be drawn by reason of the failure to call such witness. That situation does not exist in this case.

The motion for new trial will be Denied.

L. B. SCHWELLENBACH

United States District Judge

January 13, 1945.

[Endorsed]: Filed—January 13, 1945. [15]

---

**[Title of Court and Cause.]**

**ORDER DENYING MOTION FOR NEW  
TRIAL**

The above entitled matter having come on regularly for hearing before the Honorable Lewis B. Schwellenbach, Judge of the above-entitled Court, upon defendant George Clayton's Motion for New Trial and Motion in Arrest of Judgment on December 22, 1944, and argument upon said motions thereafter having been continued by the Court to December 27, 1944 and again continued by the Court to December 29, 1944, and the plaintiff being represented by Edward M. Connelly, United States Attorney for the Eastern District of Washington, and the defendant George Clayton having been represented by Del Cary Smith, Jr., Esquire, and Harold M. Gleeson, Esquire, and the Court having

heard the arguemnt of counsel and being fully advised in the premises, and having fully considered said motions and having heretofore on January 13, 1945 filed a Memorandum Decision upon said motions,

Now Therefore It Is Hereby Ordered that the defendant George Clayton's Motion for New Trial be, and the same is hereby denied. The defendant excepts to such ruling of the Court, and exception is allowed.

It Is Further Ordered that the defendant George Clayton's Motion in Arrest of Judgment be, and the same is hereby denied, to which ruling of the Court the defendant George Clayton excepts, and exception is allowed.

Done in open Court this 15 day of January, 1945.

L. B. SCHWELLENBACH

Judge of the United States District Court for the  
Eastern District of Washington

Presented by:

HARVEY ERICKSON

Asst. United States Attorney

Approved:

DEL CARY SMITH, Jr.

HAROLD M. GLEESON

[Endorsed]: Filed—January 15, 1945.

[Title of Court and Cause.]

**NOTICE OF APPEAL**  
**GEORGE CLAYTON**

Name and Address of Appellant: George Clayton,  
7225 East Carlisle, Spokane, Washington

Name and Address of Appellant's Attorneys:  
Robertson & Smith and Harold M. Gleeson [16]  
Spokane & Eastern Building, Spokane, Washington.

**Offense:**

Violation of Section 76, Title 18 United States  
Code; conspiracy to defraud by having a co-con-  
spirator falsely assume to act as an officer of the  
Narcotics Division of the Treasury Department of  
the United States, to obtain money and narcotic  
drugs.

**Date of Judgment:**

December 11th, 1944.

**Brief Description of Judgment or Sentence:**

2 Years Imprisonment and \$5,000.00 fine.

I, George Clayton, the above named appellant,  
hereby appeal to the United States Circuit Court  
of Appeals for the Ninth Circuit from the judgment  
above mentioned on the grounds set forth below.

**GEORGE CLAYTON**  
Appellant

Dated January 17, 1945.

Received Copy of the foregoing Notice of Appeal,  
with Grounds of Appeal annexed this 17th day of  
January, 1945.

EDWARD M. CONNELLY

By H. ERICKSON

United States District Attorney and Attorney for  
Plaintiff

[Endorsed]: Filed—January 17, 1945.

---

#### GROUNDΣ OF APPEAL:

1. The District Court erred in overruling appellant's motion, made at the end of the Government's case, to dismiss the indictment on account of the insufficiency of evidence, the contradictory nature thereof, and the lack of creditable proof of the existence of a conspiracy.

2. The District Court erred in failing to grant appellant's motion made at the conclusion to all of the testimony, for a directed verdict of acquittal, or a dismissal of the indictment on the grounds of the insufficiency of the evidence, the contradictory nature of the testimony of the Government, and that all the circumstances relied upon by the Government were susceptible of two constructions, and the District Court was required as a matter of law to find that such circumstances indicated innocence rather than a guilt on [17] the part of the appellant.

3. Misconduct of the District Attorney in the

argument, objected and excepted to at the time, which said argument was as follows:

"Mr. Connelly (District Attorney): It is going to be argued by the defense that this old mother loaned her son \$2,000. \* \* \* \* \* It is not a story which can be considered reasonable by any test of reason, in weighing the testimony, because she does not even offer you an explanation as to where the money came from, in what form it was, whether or not it was ever in a bank, or whether or not her son was son enough to give her a note to evidence the indebtedness, and you are sitting here as triers of the facts in an important law suit. I can only say to you do not be led astray by sentimental considerations. You are dealing with people of the under-world. Don't forget that for a moment. If a jury's intelligence can be stultified and insulted by a defense of that character, I say the bars are down——

Mr. Smith: Just a moment. We will have to raise an objection to an argument of that kind. I think it is highly prejudicial.

The Court: I will sustain the objection, and instruct the jury to disregard the last statement.  
\* \* \* \*

Mr. Connelly: \* \* \* \* Kelly was man enough to plead guilty and testify, and there was nothing I could offer him. The penalties is this court are fixed by the Court alone. District Attorneys are not even allowed to make recommendations as to penalties.

Mr. Smith: This argument is outside the case, and I object to it.

The Court: I think it is perfectly proper argument, and I will not sustain the objection. Under the instructions you have requested, I think it is proper.

Mr. Connelly: \* \* \* Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the [18] testimony.

The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

Mr. Connelly: \* \* \* We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that \$1250. You have heard Clayton's explanation of that, that he gave

the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

I submit the verdict should be guilty.

Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case.

The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted."

4. Misconduct of the District Attorney in commenting on the failure of the appellant to call a co-defendant, Wilma Shirley Doores, as a witness, she the said co-defendant not being on trial, which comment was as follows:

Mr. Connelly: " \* \* \* \* What can Kelly hope to get out of it? Nothing. He has pled guilty here.

Shirley Doores has pled guilty, and in that connection, talking about witnesses who did not appear and those who did, has it occurred to you that the matter of the deed, paying the money, the exchange of deeds, the absence of Clayton from the meeting when the conspiracy was planned, if this were only Shirley Doores' deal with Kelly and Buny, and if that is what he is clinging to on this indictment for conspiracy, if the contentions of this man Clayton and the arguments of his counsel are true, the answer to all of it would be a simple statement of fact upon the witness stand from this girl who has pled guilty already.

Shirley Doores, a narcotic addict, broken in

health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and [19] supported her common-law husband in one single iota of his claim here.

Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

Mr. Connelly: \* \* \* \* We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that \$1250. You have heard Clayton's explanation of that, that he gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

I submit the verdict should be guilty.

Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case.

The Court: The jury is the exclusive judge of

all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted."

5. The District Court erred in further instructing the jury upon the subjects of conspiracy and circumstantial evidence at the request of plaintiff's attorney and over the objection of defendant after the jury had been fully and completely instructed upon said subjects, thereby serving to emphasize in the jury's mind said instructions and, further, to weaken the instructions as given by the Court, to the prejudice of the defendant.

6. That the verdict is contrary to the evidence.
7. That the verdict is contrary to law.
8. That there was no substantial evidence upon which the verdict could have been based.

The foregoing succinct statement of the Grounds of Appeal will be amplified and added to in the Assignment of Errors.

ROBERTSON & SMITH  
By DEL CARY SMITH, Jr.  
HAROLD M. GLEESON  
Attorneys for George Clayton

[20]

---

[Title of Court and Cause.]

ORDER FIXING BOND

This matter coming regularly on for hearing this 15th day of January, 1945, upon the application of the defendant George Clayton to fix bond upon appeal to the Circuit Court of Appeals for the Ninth Circuit, and it appearing to the Court that

defendant has heretofore filed his notice of appeal to said Circuit Court of Appeals,

Now, Therefore, It Is Hereby Ordered that during the pendency of said appeal defendant may be admitted to bond in the sum of \$5000.00.

Done in Open Court this 17th day of January, 1945.

L. B. SCHWELLENBACH  
United States District Judge

Presented by:

DEL CARY SMITH, Jr.  
Of Counsel for Defendant.

Copy received Jan. 15, 1945.

HARVEY ERICKSON  
Asst. U. S. Atty.

[Endorsed]: Filed—January 17, 1945.

---

[Title of Court and Cause.]

BAIL BOND PENDING DETERMINATION  
OF APPEAL

Know All Men by These Presents: That we George Clayton, Principal, and the General Casualty Co. of America, a Corporation, as surety, are held and firmly bound unto the United States of America, in the full and just sum of Five Thousand (\$5000.00) Dollars, to be paid to the United States of America to which payment well and truly to be paid, we bind ourselves and heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 17th day

of January, 1945, in the year of our Lord One Thousand Nine Hundred and Forty Five.

Whereas, Lately at the December Term of the District Court of the United States, for the Eastern District of Washington, Northern Division, in a suit pending in said court, between the United States of America, plaintiff, and George Clayton defendant, a judgment and sentence was rendered against the said defendant George Clayton and the said George Clayton has appealed to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment [21] and sentence in the aforesaid suit.

Now, the condition of the above obligation is such that if the said George Clayton shall appear either in person or by attorney in the United States Circuit Court of appeals for the Ninth District on such day or days as may be appointed for the hearing of said cause, in said Court, and shall prosecute his said appeal, and abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in the execution of the judgment and sentence appealed from, as said Court may direct, if the judgement and sentence against him shall be affirmed, or the appeal is dismissed; and if he shall appear for trial in the District Court of the United States, for the Eastern District of Washington, Northern Division, such day or days as may be appointed for retrial by said District Court and abide by and obey all orders made by said Court, provided the judgment and sentence

against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

GEORGE CLAYTON,

Principal

[Seal]

GENERAL CASUALTY COMPANY OF AMERICA

By S. L. CATELLI,

Attorney-in-Fact

Bond approved as to Form:

EDWARD M. CONNELLY

United States District Attorney

Bond Approved this 17 day of January, 1945.

L. B. SCHWELLENBACH,  
Judge.

[Endorsed]: Filed—January 17, 1945.

---

(Excerpt From Court Minutes, Journal 16, page 699)

[Title of Cause.]

Now on this 19th day of January, 1945, pursuant to Rule 7 of the Rules of Practice and Procedure after plea of Guilty, Verdict, or Finding of Guilt in Criminal Cases brought in the District Courts of the United States, the attorneys for defendant and the United States Attorney were directed to appear before the Court with respect to the preparation of the record on appeal in the above cause. [22]

The attorneys for defendant were directed to immediately order the transcript of the evidence, and to again appear before the Court on February 9, 1945.

---

[Title of Court and Cause.]

**ORDER OF EXTENSION OF TIME FOR THE  
SETTLEMENT AND FILING OF BILL OF  
EXCEPTIONS AND ASSIGNMENTS OF  
ERROR AND PRAECIPE**

Upon the application of the defendant and appellant George Clayton and upon a showing of good cause therefore, it is

Ordered that the time of the defendant and appellant George Clayton within which to procure to be settled and to file his Bill of Exceptions herein, and in which to file his assignments of errors and praecipe herein, in connection with his aforesaid appeal be, and hereby is, extended to and including the 16th day of April, 1945.

Dated this 9th day of February, 1945.

L. B. SCHWELLENBACH

United States District Judge

Approved February 9th, 1945.

EDWARD M. CONNELLY

United States Attorney and Attorney for plaintiff

ROBERTSON & SMITH

By DEL CARY SMITH, Jr.

HAROLD M. GLEESON

Attorneys for Defendant George Clayton.

[Endorsed]: Filed—February 9, 1945. [23]

PLAINTIFF'S EXHIBIT No. 1  
Adm

Residence Phone 870

Office Phone 87

E. H. TEED, M.D.  
Coeur d'Alene, Idaho

For MRS. VELMA ROCK

Date 1-1-44

Address Pacific Hotel, Spokane, Wash.

RX MORPH SULPH H.T.Gr. SS # XL

3363

Sig: One or two tablets P.R.N. for pain

1-1-44

Spine injury      CANCELLED\*

93405

E. H. TEED, M.D.

Reg. No. 1072

Rex Drug Store

Reg. No. 2444

112 North 4th

Phone 6 Coeur d'Alene, Idaho

(Endorsement on back of Prescription)

W. G. G.

P. M. LENTS

5/27/44

REX DRUG STORE  
112 N. 4th St. Phone 6  
Coeur d'Alene, Idaho

[Printer's Note:] \* In red.

**PLAINTIFF'S EXHIBIT No. 2**  
**Adm**

Residence Phone 870

Office Phone 87

**E. H. TEED, M.D.**  
**Coeur d'Alene, Idaho**

---

**For MRS. VELMA ROCK**  
**Address Dessert Hotel, Coeur d'Alene, Ida.**

Date 1-27-47

**RX Delaudig Gr 1/20 Tab # XX**

1-27-44

**Sig: One or two tablets for Pain** 3353**Injured Spine. CANCELLED\*** 93784

**E. H. TEED, M.D.**  
**Reg. No. 1072**

**Reg. Drug Store****Reg. No. 2444****112 North 4th****Phone 6 Coeur d'Alene, Idaho**

(Endorsement on back of Prescription)

**W. G. G.**  
**P. M. LENTS**  
**5/27/44**

**REX DRUG STORE**  
**112 N. 4th St. Phone 6**  
**Coeur d'Alene, Idaho**

[Printer's Note:] \* In red.

**PLAINTIFF'S EXHIBIT No. 3**

Adm

Residence Phone 870

Office Phone 87

E. H. TEED, M.D.  
Coeur d'Alene, Idaho

For Mr. Mike Sanders  
Address Granite, Idaho

Date 2-3-44

94072

CANCELLED\*

RX MORPH. SULP H. T. Gr SS # L

8403

Sig: One or two tablets P.R.N. for pain

2-3-44

## Syphilitic ulcers

E. H. TEED, M.D.  
Reg. No. 1072

Rex Drug Store  
Reg. No. 2444  
112 North 4th  
Phone 6 Coeur

**(Endorsement on Back of Prescription)**

W. G. G.  
P. M. LENTS  
5/27/44

Presented by Dr. Teed  
REX DRUG STORE  
112 N. 4th St. Phone 6  
Coeur d'Alene, Idaho

[Printer's Note.] \* In red.

PLAINTIFF'S EXHIBIT No. 4  
Adm

Residence Phone 870

Office Phone 87

E. H. TEED, M.D.  
Coeur d'Alene, IdahoFor Mrs. VELMA ROCK  
Address Pacific Hotel, Spokane, Wash.

Date 12-30-43

127088 N

RX MORPH SULPH. H.T. Gr SS Tab # XX L E X

Sig: One or two tablets P.R.N. for pain

Injured Spine

E. H. TEED, M.D.  
Reg. No. 1072Rex Drug Store  
Reg. No. 2444  
112 North 4th  
Phone 6 Coeur d'Alene, Idaho

(Endorsement on back of Prescription)

H. H. HART  
5/27/44 W.G.G.HART'S DRUG STORE  
H. H. Hart  
Coeur d'Alene, Idaho

**PLANTIFF'S EXHIBIT No. 5**  
**Adm**

Residence Phone 870

Office Phone 87

E. H. TEED, M.D.  
Coeur d'Alene, Idaho

---

**Mr. Mike Sanders**

Date 1-24-44

Address Granite, Ida.

127938 N  
B A E

**RX MORPH SULPH H.T. Gr<sup>1/4</sup> tab # XXC**

Sig: Tab # IV f. i. d for pain

Syphilitic Ulcers

E. H. TEED, M.D.  
Reg. No. 1072

Take This to

Hart's Drug Store

Prescription Druggists

H. H. Hart Coeur d'Alene, Idaho

(Endorsement on back of Prescription)

H. H. HART

W G G

5/27/44

**HART'S DRUG STORE**

H. H. Hart

Coeur d'Alene, Idaho

**PLAINTIFF'S EXHIBIT No. 6**  
**Adm**

Residence Phone 870

Office Phone 87

E. H. TEED, M.D.  
Coeur d'Alene, Idaho

For Mrs. Velma Rock  
Address Pacific Hotel, Spokane, Wash.

Date 2-9-44

94187

RX MORPH SULPH H. T. Gr SS # XL

2-9-44

Sig: One or two tablets P.R.N. for pain  
Injury to Spine CANCELLED\*

E. H. TEED, M.D.  
Reg. No. 1072

Rex Drug Store  
Reg. No. 2444  
112 North 4th  
Phone 6 Coeur d'Alene, Idaho

(Endorsement on back of Prescription)

W. G. G.  
P. M. LENTS  
5/27/44

**REX DRUG STORE**  
112 N. 4th St. Phone 6  
Coeur d'Alene, Idaho

[Printer's Note:] \* In red.

PLAINTIFF'S EXHIBIT No. 7

Adm

Residence Phone 870

Office Phone 87

E. H. TEED, M.D.  
Coeur d'Alene, Idaho

---

For Mr. Mike Sanders

Date 2-17-44

Address Granite, Idaho

128692 N

BEX

RX MORPH SULPH H. T. Gr SS tab # L

Sig: One or two tablets P.R.N. for pain

Syphilitic Ulcers

E. H. TEED, M.D.  
Reg. No. 1072

Rex Drug Store

Reg. No. 2444

112 North 4th

Phone 6 Coeur d'Alene, Idaho

(Endorsement on back of Prescription)

E. H. TEED, M.D.

H. H. HART

W. G. G.

5/27/44

HART'S DRUG STORE

H. H. HART

Coeur d'Alene, Idaho

**PLAINTIFF'S EXHIBIT No. 8**  
**Adm**

Residence Phone 870

Office Phone 87

E. H. TEED, M.D.  
Coeur d'Alene, Idaho

---

Mr. Mike Sanders

Date 2-23-44

Address Granite, Ida

128918 N

RX MORPH SULPH H. T. Gr SS # LX

BCE

Sig: Two tablets P.R.N. for pain

Syphilitic Ulcers

E. H. TEED, M.D.  
Reg. No. 1072

Take this to

Hart's Drug Store

Prescription Druggists

H. H. Hart Coeur d'Alene, Idaho

(Endorsement on back of Prescription)

DR. E. H. TEED

H. H. HART

W. G. G.

5/27/44

HART'S DRUG STORE

H. H. HART

Coeur d'Alene, Idaho

**PLAINTIFF'S EXHIBIT No. 9**  
**Adm**

Residence Phone 870

Office Phone 87

E. H. TEED, M.D.  
Coeur d'Alene, Idaho

---

**Mr. Mike Sanders**  
Address Granite, Idaho

Date 3-5-42

**RX Delaudig Gr 1/16 # C**

Sig: Two tablets P.R.N. for pain                   **129270 N**

Syphilatic Ulcers                                   **SXE**

E. H. TEED, M.D.  
Reg. No. 1072

Take this to  
Hart's Drug Store  
Prescription Druggists  
H. H. Hart, Coeur d'Alene, Idaho

(Endorsement on back of Prescription)

DR. E. H. TEED   W. G. G.  
H. H. HART     
5/27/44

HART'S DRUG STORE  
H. H. HART  
Coeur d'Alene, Idaho

**PLAINTIFF'S EXHIBIT No. 10**  
**Adm**

Residence Phone 870

Office Phone 87

E. H. TEED, M.D.  
Coeur d'Alene, IdahoFor Mr. Mike Sanders  
Address Granite, Idaho

Date 3/14/44

RX MORPH SULPH H. T. Gr 1/4 # CC

129609 N  
REX

Sig: One or two tablets P.R.N. for pain

E. H. TEED, M.D.  
Reg. No. 1072Rex Drug Store  
Reg. No. 2444  
112 North 4th  
Phone 6 Coeur d'Alene, Idaho

(Endorsement on back of Prescription)

DR. E. H. TEED  
H. H. HART  
5/27/44

W. G. G.

HART'S DRUG STORE  
H. H. HART  
Coeur d'Alene, Idaho

## PLAINTIFF'S EXHIBIT No. 11

Adm

Residence Phone 870

Office Phone 87

E. H. TEED, M.D.  
Coeur d'Alene, Idaho

For Mr. Mike Sanders

Date 3-22-44

Address Granite, Idaho

129852

RX MORPH SULPH Gr 1/4 tab # C

UEX

Sig: One or two tablets P.R.N. for pain

Syphilitic Ulcers

E. H. TEED, M.D.

Reg. No. 1072

Rex Drug Store

Reg. No. 2444

112 North 4th

Phone 6 Coeur d'Alene, Idaho

(Endorsement on back of Prescription)

DR. E. H. TEED

H. H. HART

5/27/44

W. G. G.

HART'S DRUG STORE

H. H. HART

Coeur d'Alene, Idaho

PLAINTIFF'S EXHIBIT No. 12  
Adm

Residence Phone 870

Office Phone 87

E. T. TEED, M.D.  
Coeur d'Alene, IdahoFor Mr. Mike Sanders  
Address Granite, Idaho

Date 3-18-44

RX MORPH SULPH H. T. Gr 1/4 Gr tab # CC  
129758 N  
REX

Sig: One or two tablets P.R.N. for pain

Syphilitic Ulcers

E. H. TEED, M.D.  
Reg. No. 1072Rex Drug Store  
Reg. No. 2444  
112 North 4th  
Phone 6 Coeur d'Alene, Idaho

(Endorsement on back of Prescription)

DR. E. H. TEED  
H. H. HART  
5/27/44

W. G. G.

HART'S DRUG STORE  
H. H. HART  
Coeur d'Alene, Idaho

**PLAINTIFF'S EXHIBIT No. 13**

Adm

Residence Phone 870

Office Phone 87

E. H. TEED, M.D.  
Coeur d'Alene, Idaho

Mr. Mike Sanders  
Address Granite, Idaho

Date 4/1/44

RX Delaudig Gr 1/16 tab # C

130210

CEX

**Sig:** One or two tab. P.R.N. for pain

## Syphilitic Ulcers

E. H. TEED, M.D.  
Reg. No. 1072

Take This To  
Hart's Drug Store  
Prescription Druggists  
H. H. Hart, Coeur d'Alene, Idaho

(Endorsement on back of Prescription)

DR. TEED

H. H. HART

W. G. G.

5/27/44

## HART'S DRUG STORE

H. H. HART

## Coeur d'Alene, Idaho

PLAINTIFF'S EXHIBIT No. 14  
Adm

Office Phone 87

Res. Phone 870

E.H. TEED, M.D.  
Physician and Surgeon  
Coeur d'Alene, Idaho

For Mike Sanders

Date 4-3-44

Address Granite, Idaho

48488

RX Dilaudid Gr 1/20 tab # C

HSX

Sig: One or two tablets P.R.N. for pain

Syphilitic Ulcers

E. H. TEED, M.D.  
Reg. No. 1072Take This to  
Woodcock's  
Drug Stores

(Endorsement on back of Prescription)

WOODCOCK'S DRUG

W. G. G.

5/27/44

M. W. MARKUM

**PLAINTIFF'S EXHIBIT No. 15**

Adm

E. H. TEED, M.D.

Office Phone 87

Coeur d'Alene, Idaho

Residence Phone 870

U. S. Reg. No. 1072

Wilson Building

---

Patient Mr. Mike Sanders  
Granite, Idaho

Date 4-6-44

RX MORPH SULPH H.T. Gr SS tab # L . . . . . 95363

Sig: One tablet P.R.N. for pain

Syphilitic Ulcers      CANCELLED\*

E. H. TEED, M.D.

Never offer this prescription to a friend for a seemingly similar ailment. It is your personal prescription, prepared for you specific illness at this particular time.

(Endorsements on back of prescription)

W.G.G.

P. M. LENTS

5/27/44

Presented by Dr. Teed

REX DRUG STORE  
112 N. 4th St. Phone 6  
Coeur d'Alene, Idaho

---

[Printer's Note]: \* In red.

**PLAINTIFF'S EXHIBIT No. 16****Adm****E. H. TEED, M.D.****Office Phone 87****Coeur d'Alene, Idaho****Residence Phone 870****U. S. Reg. No. 1072****Wilson Building**

**Patient**   **Mr. Mike Sanders**  
**Granite, Ida.**

**Date 4-8-44**

**RX**   **MORPH SULPH H. T. Gr SS tab # L**           **94388**

**Sig:** One tablet P.R.N. for pain

**Syphilitic Ulcers**           **CANCELLED\***

**E. H. TEED, M.D.**

Never offer this prescription to a friend for a seemingly similar ailment. It is your personal prescription, prepared for your specific illness at this particular time.

(Endorsement on back of Prescription)

W.G.G.

**P. M. LENTS**  
**5/27/44**  
**Presented by Dr. Teed**

**REX DRUG STORE**  
**112 N. 4th St. Phone 6**  
**Coeur d'Alene, Idaho**

[31]

[Printer's Note] : \* In red.

PLAINTIFF'S EXHIBIT No. 18

Adm

WESTERN UNION

1 NL

Spokane Wn. 14th. 1944.

Dr. E. H. Teed Care Genl Dly office. Postoffice.

Hailey Idaho.

Phone me at this number Walnut 1635 at once soon as you receive this message.

SHIRLEY CLAYTON.

8 # 9

5-27-44

47 — 1120 1A-27

Red for Mrs. Teed

S.D.S.

H.H.H.

5-27-44

(Notations on back of telegram)

SMOKY

7225 E. Carlyle

**PLAINTIFF'S EXHIBIT No. 19**  
**Adm**

**SHARE ACCOUNT BOOK**

**FIRST FEDERAL SAVINGS AND LOAN  
ASSOCIATION**

Home Office: North 120 Wall Street, Spokane, Washington

In Acct. With	Georgia Cook or Edna E. Cook 815 - 7th St. Coeur d'Alene, Idaho	No. 19248 Type
---------------	---	-------------------

	Date	Repurchases	Dividends	Share Payments	Balance
1	11-22-40			600.00	600.00
2	11-22-40			200.00	200.00
3	11-27-40				800.00
4	11-27-40			200.00	1,000.00
5	12- 6-40			200.00	1,200.00
6	12-23-40	700.00			500.00
7	3- 8-41		1.04		501.04
8	3- 8-41			200.53	701.57
9	3-27-41			100.00	801.57
10	5-16-41			809.32	1,610.89
11	11-15-41		9.82		1,620.71
12	11-15-41	200.00			1,420.71
13	12-26-41			250.00	1,670.71
14	2-18-42	Div. Jan. 1, '42	17.75	1359.85	1,688.46
15	2-18-42			200.00	1,888.46
16	3- 3-42			911.54	2,800.00
17	3-24-42			200.00	3,000.00
18	6-30-42			500.00	3,500.00
19	7-31-42	Div. Jul 1, '42	31.61		3,531.61
20	7-31-42			800.00	4,331.61
21	8-29-42			200.00	4,531.61
22	9-14-31			468.39	5,000.00
23			57.05	3279.93	
24	4- 7-44		63.21		5,120.26

(Plaintiff's Exhibit No. 19—(Continued))

(Forward to Second Page)

Date	Repurchases	Dividends	Share Payments		Balance
			Common	Preferred	
1 4-7-44	Div. Jan. 1 '44		51.20		5,171.46
2 4-7-44	3,500.00				1,671.46
3 4-24-44	1,671.46				0.00

**PLAINTIFF'S EXHIBIT No. 20**  
**Adm**

Name Edna E. or Georgie Cook No. 15590

Type      No. Shares

Date	Repurchases	Dividends	Received Amount in Repurchases		Balance
			Column	Share Credits	
1 1-22-38				1,600.00	1,600.00
2	Div. Jul. 1 '38	20.00			1,620.00
3	Div. Jan 1 '39	24.30			1,644.30
4	Div. Jul. 1 '39	24.66			1,668.96
5 9- 1-39	1668.96	CK			0.00

The First Federal Savings & Loan Association  
Spokane, Washington

**PLAINTIFF'S EXHIBIT No. 21**  
**Adm**

Name **Georgia or Edna E. Cook** No. 19248  
**815 7th Ave., Coeur d'Alene, Idaho**

	Date	Repurchases	Type	No. Shares	Received Amount in Repurchases
			Dividends	Column Share Credits	Balance
1	11-22-40		CK	600.00	600.00
2	11-22-40			200.00	200.00
3	11-22-40				800.00
4	11-27-40			200.00	1,000.00
5	12- 6-40			200.00	1,200.00
6	12-23-40	700.00	Edna E. Cook		500.00
7				1.04	501.04
8	3- 8-41			200.53	701.57
9	3-27-41			100.00	801.57
10	5-16-41			809.32	1,610.89
11			9.82 S		1,620.71
12	11-15-41	200.00	Edna E. Cook		1,420.71
13	12-26-41			250.00	1,670.71
14		Div. Jan 1, '42	17.75		1,688.46
15	2-18-42			200.00	1,888.46
16	3- 3-42			911.54	2,800.00
17	3-24-42			200.00	3,000.00
18	6-30-42			500.00	3,500.00
19		Div. Jul. 1, '42	31.61		3,531.61
20	7-31-42			800.00	4,331.61
21	8-29-42			200.00	4,531.61
22	9-14-42			468.39	5,000.00
23			57.05 P		5,057.05
24			63.21 L		5,120.26
				51.20	

Signature

EDNA E. COOK

(Second Page of Ledger Card)

1		Div. Jan 1 '44	51.20	5,171.46
4	4- 7-44	3,500.00	Edna E. Cook Ck 48353	1,671.46
3	4-24-44	1,671.46	Edna E. Cook # 48530	0.00

The First Federal Savings & Loan Association  
 Spokane, Washington

[33]

## PLAINTIFF'S EXHIBIT No. 22

**Adm****FIRST**

**FEDERAL SAVINGS**  
and Loan Association  
of Spokane  
North 120 Wall Street  
Spokane, Washington

No. 48530

Spokane, Wash.  
April 24, 1944

Svgs. Acc't. #19248 Cook

**PAY TO THE**  
**ORDER OF** \* \* \* Edward H. Teed \* \* \* **\$1,671.46**

1 st Federal \$1,671 & 46 Cts DOLLARS  
Spokane 1,671.46 Con

To FIRST NATIONAL BANK IN SPOKANE  
28-5 Spokane, Washington

E. T. HAY  
Authorized Signature

(Endorsement on Back of Check)

EDWARD H. TEED

917 Foslit  
Coeur d'Alene, Ia.  
3K3

**PLAINTIFF'S EXHIBIT No. 23**  
**Adm**

**FIRST**  
**FEDERAL SAVINGS** No. 48353  
**And Loan Association**  
**of Spokane**  
**North 120 Wall Street** Spokane, Wash.  
**Spokane, Washington** April 7, 1944

C: 19248 Cook

**PAY TO THE**  
**ORDER OF** EDWARD H. TEED \$3,500.00  
 1 St. Federal \$3,500. & 00 Cts DOLLARS  
 Spokane

To FIRST NATIONAL BANK IN SPOKANE  
 28-5 Spokane, Washington

GEO. PATTULO  
 Authorized Signature

(Endorsement on Back of Check)

DR. EDWARD H. TEED  
 R

Pay to the Order of Any Bank, Banker or Trust Co.	Pay to the Order of Any Bank or Banker or Through Spokane Clearing House
All Prior Endorsements Guaranteed	All Prior Endorsements Guaranteed
Apr 12 1944	28 APR 13 '44 3324 28
Coeur d'Alene Branch	— —
The Idaho First National Bank	3 3
Coeur d'Alene, Idaho	THE OLD NATIONAL BANK Of Spokane, Washington

PLAINTIFF'S EXHIBIT No. 26  
Adm

(Record Telephone Call)

Date	Apr 20 1944	Tel Out
Place	From	State
HAILEY, IDAHO		
Tel No.		
29 Att		
Person	Spec. Inst.	T & C
To		
Place		State
SPOKANE		WASH
Collect	Tel No.	
	Walnut 1635	
Accepted	Person	
Address Name		
ASSOC. CO.		
Filing Time	3 10 P	Disconnect 3 16 7
Operator 1		Connect 3 12 0 PM
Toll Center		Elapsed Time 4 7
Term Via	Mins	5 Class
First Route Bse	Charge	1 55
Alt. Route	Messenger Tax	39
		1 94

**PLAINTIFF'S EXHIBIT No. 27**

(Pass Book)

No. 166213

## **EDNA E. COOK, or GEORGIE COOK**

**In Account**      **SPOKANE AND EASTERN BRANCH OF**  
**With**                **Seattle-First National Bank**  
                          **of Spokane, Washington**

Date	Interest or Initials	Withdrawals	Deposits	Balance
Oct 14 '42	JC		1000 —	1000 —
Nov 18 '42	Ca		910 —	1910 —
Nov 30 42	Ca		550 —	2460 —
Feb 1 '43	Ca		40 —	2500 —
Mar 11 '43	Ca		1125 —	3625 —
Int. Oct 1, 1943			15.29	3640.29
Int. Jan. 1, 1943			4.32	3644.61
Jul 14 '43			1375 —	5019.61
Int. Jan. 1, 1944			23.86	5043.47
Apr 7 '44	Pt	3500 —		1543.47
Apr 24 '44	Pt	1500		43.47

〔35〕

**PLAINTIFF'S EXHIBIT No. 28**  
**Adm**

Application for  
 Cashier's Checks or Bank Drafts  
 SPOKANE AND EASTERN  
 Branch of Seattle-First National Bank

Spokane, Wash., Apr. 7, 1944

Payable To	Cashier's Check or Bank Draft On	Dollars	Cents
<b>EDWARD H. TEED</b>		<b>3500</b>	—
	Exchange		
		<b>Total</b>	<b>3500</b>
<b>EDNA C. COOK (Svgs)</b>			—

P

---

**PLAINTIFF'S EXHIBIT No. 29**  
**Adm**

Name 166213

Signature **EDNA E. COOK**

Withdrawals	Deposits Interest	Date	Balance
	<b>1,000.00</b>	Oct. 14 '42	<b>1,000.00</b>
Interest accrued to	910.00	Nov 18 '42	1,910.00
Jan 1, '43 payable	550.00	Nov 30 '42	2,460.00
Jul 1, '43	4.32	Jan 1 '43	2,464.32
	40.00	Feb 1 '43	2,504.32
	<b>1,125.00</b>	Mar 11 '43	<b>3,629.32</b>
Int. Jul 1, 1943	15.29	Jul 1 '43	3,644.61
	<b>1,375.00</b>	Jul 14 '43	<b>5,019.61</b>
Int. Jan 1, 1944	23.86	Jan 1 '44	5,043.47
<b>3,500.00</b>		Apr 7 '44	<b>1,543.47</b>
<b>1,500.00</b>		Apr 24 '44	<b>43.47</b>
Int. Jul 1, 1944	.22	Jul 1	43.69

SPOKANE AND EASTERN  
 Branch of Seattle-First National Bank  
 Spokane, Washington

PLAINTIFF'S EXHIBIT No. 30  
Adm28-4 SPOKANE AND EASTERN 28-4  
Branch of Seattle-First National Bank

No. 31025

Spokane, Washington, Apr. 7 - 1944

Pay to the order of EDWARD H. TEED \$3500.00  
Spokane  
& Eastern \$3,500 and 00 Cts DOLLARS

## CASHIER'S CHECK

H. E. FOULKS  
Assistant Cashier—Assistant-Vice  
President  
W

(Endorsement on Back of Check)

DR. E. H. TEED

Pay to the Order of Any Bank, Banker  
or Trust Co. All Prior Endorsements  
Guaranteed Apr 10 194411 Coeur d'Alene Branch 11  
The Idaho First National Bank  
Coeur d'Alene, Idaho

## PLAINTIFF'S EXHIBIT No. 31

Adm

United States of America

63

(3 Sheets)

Geo. T. Clayton  
Pacific Hotel  
Spokane, Wash.

In Account With  
THE OLD NATIONAL BANK OF SPOKANE  
Spokane, Washington

Checks	Deposits	Date	New Balance	Date	New Balance
Balance Brought Forward		Mar 27 '44	784.57	Mar 27 '44	784.57
79.44		Mar 29 '44	705.13	Mar 29 '44	705.13
200.00		Apr 1 '44	505.13	Apr 1 '44	505.13
55.00		Apr 6 '44	450.13	Apr 6 '44	450.13
	1,050.00	Apr 12 '44	1500.13	Apr 12 '44	1500.13
120.00		Apr 20 '44	1380.13	Apr 20 '44	1380.13
		Apr 27 '44	1380.13	Apr 27 '44	1380.13
Balance Brought Forward	2,000.00	May 1 '44	3380.13	May 1 '44	3380.13
380.00		May 6 '44	3000.13	May 6 '44	3000.13
		May 27 '44	3000.13	May 27 '44	3000.13
Balance Brought Forward	1000.00	Jun 2 '44	2000.13	Jun 2 '44	2000.13
2000.00		Jun 12 '44	.13	Jun 12 '44	.13
	89.00	Jun 15 '44	89.13	Jun 15 '44	89.13
89.13		Jul 21 '44	.00	Jul 21 '44	.00

BAL

GARNISHMENT [37]

PLAINTIFF'S EXHIBIT No. 32  
Adm

THE OLD NATIONAL BANK  
of Spokane, Washington

Deposited For Account of  
GEO. T. CLAYTON

Date May 1st, 1944

Currency	Dollars	Cents
	2000.	
ONB      5 3 9	May 1 44	2,000.00 D
28-3		

---

PLAINTIFF'S EXHIBIT No. 33  
Adm

THE OLD NATIONAL BANK  
of Spokane, Washington

Deposited For Account of  
GEO. T. CLAYTON

Date April 12 1944

Currency	1050.00	
ONB      8 8 8	Apr 12 44	1,050.00 D
28-3		

PLAINTIFF'S EXHIBIT No. 34  
Adm

## REGISTRATION CARD

Guests Without Baggage Please Pay in Advance

Money, jewels and valuables must be deposited in the office safe, otherwise the proprietor will not be responsible for any loss.

Name E. H. TEED

Street

City Coeur d'Alene, State Ida

Representing

Room	Rate	Arrive	Folio
214	1.00	12 30 P.M.	

Date	No. in Party	Clerk
April 21 1944	1	M

Remarks

(On Reverse of Card)

Room 214 TEEL, E. H. OUT 2508

Month of	Arrive	Depart	No. Days	Rate	File No.	Amounts and Acct. Rendered
Apr 21 1944				1.00		

Date	Extras	Date	Credit
Apr 21 1944 to 22nd	1.00	4/21	1.00
to 23rd	1.00	4/22	1.00
to 24th	1.00	4/23	1.00

OUT  
Apr 24 1944

[38]

## PLAINTIFF'S EXHIBIT No. 36

Adm

## (15 Deposit Slips)

Deposited With  
The Old National Bank & Union Trust Co  
of Spokane, Washington  
For Account of

GEO T CLAYTON

Date Aug 17 1943

Currency 500.00

ONB 6 3 8 Aug 17 43 500.00 D  
28-3

ONB 0 3 4 Sep 29 145.00 D  
28-3

---

THE OLD NATIONAL BANK  
of Spokane, Washington  
Deposited For Account of  
GEO T CLAYTON

Date Oct 7 1943

Currency 150.00

ONB 4 8 7 Oct 7 43 150.00 D  
28-3

---

THE OLD NATIONAL BANK  
of Spokane, Washington  
Deposited For Account of  
GEO T CLAYTON

Date Sept 29th 1943

Currency 145.00

---

ONB 5 6 0 Oct 20 43 256.00 D  
28-3

THE OLD NATIONAL BANK  
of Spokane, Washington  
Deposited For Account of  
GEO T CLAYTON  
Date Nov 17th 1943

Currency	1 3 1	Nov 17	43	200.00	D
ONB					
28-3					

---

THE OLD NATIONAL BANK  
of Spokane, Washington  
Deposited for Account of  
GEO T CLAYTON  
Date Dec 8 1943

Currency				215.00	
Checks				35.00	
				<hr/>	
				250.00	

THE OLD NATIONAL BANK  
of Spokane, Washington  
Deposited For Account of  
GEO T CLAYTON  
Date Dec 13, 1943

Currency	100.00		
Checks	20.00		
	<hr/>		
	120.00		

ONB	2 4 9	Dec 13	43	120.00	D
28-3					

ONB	3 6 6	Dec 8		250.00	D
28-3					

---

THE OLD NATIONAL BANK  
of Spokane, Washington  
Deposited for Account of  
GEO T CLAYTON  
Date Dec 22, 1943

Currency	56.70		
Checks	31.78		
	<hr/>		
	88.48		

ONB	4 4 0	Dec 22		88.48	D
28-3					

THE OLD NATIONAL BANK  
of Spokane, Washington  
Deposited for Account of  
GEO T CLAYTON  
Date Jan 21 1943  
Currency 95.00  
Checks 5.00  

---

100.00

ONB 7 1 6 Jan 21 44 100.00 D  
28-3

---

THE OLD NATIONAL BANK  
of Spokane, Washington  
Deposited for Account of  
GEO T CLAYTON  
Date Feb 1st 1944  
Currency 400.00  
Checks 32.24  
“ 10.00  

---

442.24

ONB 2 9 7 Feb 1 44 442.24 D  
28-3

---

THE OLD NATIONAL BANK  
of Spokane, Washington  
Deposited for Account of  
GEO T CLAYTON  
Date Feb 11 1944  
Currency 150.00  
Checks 65.35  
“ 44.49  

---

259.84

THE OLD NATIONAL BANK  
of Spokane, Washington  
Deposited for Account of  
GEO T CLAYTON  
Date Feb 24 1944  
Currency 120.00  

---

120.00 D

[39]

ONB 8 4 6 Feb 24 44 120.00 D  
28-3

THE OLD NATIONAL BANK  
of Spokane, Washington  
Deposited for Account of  
GEO T CLAYTON  
Date Feb 28 1944  
Currency 500.00 D  
ONB 3 1 8 Feb 28 44 500.00 D  
28-3

THE OLD NATIONAL BANK  
of Spokane, Washington  
Deposited for Account of  
GEO T CLAYTON  
Date June 15 1944  
Checks 89.00  
ONB 6 5 7 Jun 15 44 89.00 D  
28-3

---

THE OLD NATIONAL BANK  
of Spokane, Washington  
Deposited for Account of  
GEO T CLAYTON  
Date Sept 7 1943  
Currency 225.00 D  
ONB 6 1 5 Sep 7 43 225.00 D  
28-3

[40]

PLAINTIFF'S EXHIBIT No. 37  
Adm  
(Signature Card)

Geo. T. Clayton

To The Old National Bank of Spokane, Washington

Below is my signature, which you will recognize in the payment of funds or the transaction of other business on my checking account. It is understood and agreed that your monthly maintenance charge may be made, whether or not this account is active. It is also agreed that items other than cash are received on deposit with the express understanding that they are taken for collection only.

Sign Here      GEO T CLAYTON

Address      Pacific Hotel      Phone

Occupation      Labor      \$400 Cr      Opened By ERE

Date Sep 15 1942      Reference  
                            Introduced by

(Notation on back of card)

6-2044 Balance held a/c writ of garnishment      \$89.13

Final ste mailed

## PLAINTIFF'S EXHIBIT No. 38

Adm

W.G.G. 5/26/44

Original

Value One (1) Cent

## TREASURY DEPARTMENT

United States Internal Revenue Order Form for  
 Opium or Coca Leaves, or Compounds, Manufactures,  
 Salts, Derivatives or Preparations Thereof  
 Under Section 2 of the Act of Congress Approved  
 December 17, 1914 Series of 1923

Special Tax under said Act in each of the classes and at the location specified below must be paid for a fiscal period covering the date inserted by the purchaser before this form may be used.

No. MM667338	Date 4-24 1944	This Order Is For Exactly 2 Items. Number of Items Must Be Specified By Purchaser or Form Returned
	To be filled in by Purchaser	

Unless this order calls only for one ounce of an aqueous narcotic solution, it may be filled only by an importer, manufacturer, producer, compounder, or wholesale dealer (a class 1 or 2 registrant); if filled by any other person, liability to tax under the Act as a producer will be incurred by the vendor if broken or unstamped packages are supplied, and liability to tax thereunder as a wholesale dealer will be similarly incurred if stamped packages are furnished.

The merchandise requested below may not be furnished if this form shows any alteration or erasure or evidence of any change whatsoever.

If unused upon discontinuance of business this form must be returned for cancellation to the collector who issued it.

Name, Address, Registry and Class Numbers, and District to be Inserted in Collector's Office.

E. H. TEED, M.D.  
 Coeur d'Alene, Ida.

Cl. 4—Reg #1072

Issued 7/12-30

Date

By EVAN EVANS  
 Collector

To McKesson & Robins  
 Street 160 S. Wall City Spokane State Wash [41]

You are requested to send to me at the location above specified by the collector of internal revenue for this district the following merchandise which comes within the purview of the act of December 17, 1914, as amended by the Act of November 23, 1921, for use, sale, or distribution in the lawful conduct of my business or legitimate practice of my profession, for which I am duly registered under the above stated registry number at this time under said Act, and for which I have paid the taxes necessary to qualify me in the above stated classes for a fiscal period covering the date of this order which has been inserted above by me:

## TO BE FILLED IN BY PURCHASER

To be filled in  
by consignor

Item	Cata- logue Num- ber If Any	Number of Pack- ages	Size of Package Number of Pounds Ounces, Grains, Pills, Tablets., et. in each Package	Name of Article Name of Narcotic Drug involved must be stated	Number of Stamped Packages Furnished	Date Filled
1		1	1000	Morph Sulph H T G 1/2	1	4/24
2		1	1000	Morph Sulph H T G 1/4	1	4/24
Chgd to Wilson C.D.A.						

2.

Name of Person or Firm if  
Not an Individual

Dr. E. H. TEED

Signature of Purchaser, or His  
Attorney or Agent

## PLAINTIFF'S EXHIBIT No. 39

Adm

United States of America

73

McKesson & Robbins, Incorporated  
 Spokane & Blumauer-Frank Division  
 Phone Riv. 2141  
 160 S. Wall St. Spokane, Wash.

Sold To Wilson's Pharmacy  
 Street Town Coeur d'Alene State Idaho

Pricer	Biller	Seanner	Ship (How?)	Waiting	Ship When	Date Ordered
Credit	Approval	Buyer	Check	Check	Date Shipped	
Clerk	Check	Quantity	Unit	Customer's Order No.	Show Specifications	Cash Disc.
1000-2		1	X	# 134	2	20.00
				1000—H. T. Morph Sulph $\frac{1}{2}$		8*
1000-1		1	X	# 132	2	10.50
				1000—H. T. Morph Sulph $\frac{1}{4}$		
						<u>30.50</u>
					DR. E. H. TEED	

\* Figure in red.

[43]

## PLAINTIFF'S EXHIBIT No. 40

Adm

Name H. M. NORD — Clayton

Borrower's Liability Direct

Date	Principal	Paid	Balance
6- 5-40	100 —		100 —
11-26-40		100 —	
5-29-41	500 —		500 —
8- 6-41		500 —	
11-13-41	500 —		500 —
4-22-42		500 —	
7-21-42	200 —		200 —
"	150 —		350 —
8- 1-42	1750 —		2100 —
8-17-42		43.88	2056.12
9-28-42		41.47	2014.65
10-24-42		150 —	1864.65
"		41.68	1822.97
11-23-42		41.89	1781.08
12-21-42		42.09	1738.99
1-25-43		17.31	1721.68
2- 1-43		200.00	1521.68
2-23-43		17.39	1504.29
3-22-43	200 —		1704.29
3-22-43		17.48	1686.81
4-24-43		17.57	1669.24
4-28-43		200.00	1469.24
5-18-43		17.65	1451.59
6-21-43		17.74	1433.85
7-20-43		17.83	1416.02
8-21-43		17.92	1398.10
9-24-43		18.01	1380.09
10-22-43		18.10	1361.99
11-29-43		18.19	1343.80
12-30-43		18.28	1325.52
1-29-44			1325.52
3- 1-44		18.37	1307.15
3-27-44		18.46	1288.69
3-27-44		18.56	1270.13
4-25-44		18.65	1251.48
5-18-44		1251.48	

## PLAINTIFF'S EXHIBIT No. 41

Adm

Feb 1933 837 April 10 44

R. C. PRATT FURNITURE STORE

Complete Home Furnishers  
N. 213-215 Post St. Phone Riv. 6119

Spokane, Wash. 4/10/1944

When Wanted      Sold to      MRS. GEORGE CLAYTON  
 4/10                  Address      7225 E. Carlisle  
 5 P.M.                 Orchard Ave.

Stock Number	Quantity Ordered	Items	Price Each	Total
3448	1	Rose Davenport & Chair	279.50	279.50
		Tax		8.39
				287.89

S 7

C O D

287.89	
Less Trade 27.89	
260.00	Receipt
	# 4548
	4/10/44

---

Cash Selling Price, (including any sales tax)	\$ 287.89
---	-----------

---

Payable at Terms of C O D less trade in

Delivered by  
 Campbell  
 Folio 1482  
 April 10 1944

---

## PLAINTIFF'S EXHIBIT No. 44

## CONTRACT—RECEIPT

Contract No.....

Spokane, Washington, Apr 24 1944

The Old National Bank of Spokane has leased to me Box No. D 868 in the safe deposit vaults of the Old National Bank Building, such letting being subject to the rules and regulations printed on the receipt given, to which rules and regulations I hereby agree, and which rules and regulations are hereby made a part of this contract, all subject to State and Federal laws relating thereto.

CANCELLED\*

CANCELLED\*

I hereby acknowledge to have received two keys to said safe.  
combination

Witness

Signed

RUTH WARNER

VERA WILSON

TRANSFERRED Spokane, Washington, Aug 4-1944

Received from The Old National Bank of Spokane.....  
Dollars for Key Deposit ..... Dollars for Unexpired Rental  
in full settlement of account.

I hereby acknowledge that all the property stored in the safe deposit vaults of the Old National Bank of Spokane, pursuant to the above contract, and the extensions and renewals thereof, has been safely withdrawn therefrom, and all liability of said Bank therefore is hereby accordingly released.

I hereby surrender said Box No. ..... by reason of—Transferred to Harold Gleeson.

Witness

Signed

H. C. ROBB

VERA WILSON

(On reverse side of card)

Vera Wilson

IDENTIFICATION

Box No. D 868

Signature VERA WILSON

Annual Rate \$12.00

Residence Kettle Falls Gen. Del.

Business None

Telephone

CANCELLED\*

CANCELLED\*

Birthday May 14

Mother's Maiden Name Grace Van Alstine

Reference

Remarks

\* Printed in red.

[46]

## PLAINTIFF'S EXHIBIT No. 45

(7 Slips—Safe Deposit Department)

The Old National Bank of Spokane

Safe Deposit Department W

-868- Apr 24 2 39 PM 1944

The undersigned, lessor or other person duly authorized to enter the safe deposit box numbered below, hereby applies for entry thereto.

Sign Here VERA WILSON Box Number D 868

The Old National Bank of Spokane

Safe Deposit Department H

-868- May 1 2 47 PM 1944

The undersigned, lessor or other person duly authorized to enter the safe deposit box numbered below, hereby applies for entry thereto.

Sign Here VERA WILSON Box Numbr D 868

The Old National Bank of Spokane

Safe Deposit Department H

-868- May 4 2 58 PM 1944

The undersigned, lessor or other person duly authorized to enter the safe deposit numbered below, hereby applies for entry thereto.

Sign Here VERA WILSON Box Number D 868

The Old National Bank of Spokane

Safe Deposit Department W

-868- May 10 10 56 AM 1944

The undersigned, lessor or other person duly authorized to enter the safe deposit numbered below, hereby applies for entry thereto.

Sign Here VERA WILSON Box Number D 868

The Old National Bank of Spokane

15 Safe Deposit Department H  
-868- May 16 2 49 PM 1944

The undersigned, lessor or other person duly authorized to enter the safe deposit numbered below, hereby applies for entry thereto.

Sign Here VERA WILSON Box Number D 868

[47]

The Old National Bank of Spokane

Safe Deposit Department H  
-868- May 17 4 21 PM 1944

The undersigned, lessor or other person duly authorized to enter the safe deposit box numbered below, hereby applies for entry thereto.

Sign Here VERA WILSON Box Number D 868

The Old National Bank of Spokane

Safe Deposit Department H  
-868- May 29 3 13 PM 1944

The undersigned, lessor or other person duly authorized to enter the safe deposit box numbered below, hereby applies for entry thereto.

Sign Here VERA WILSON Box Number D 868

[48]

PLAINTIFF'S EXHIBIT No. 46  
MONEYS HELD IN CASE UNITED STATES  
VS. SHIRLEY DOORES

Currency numbered as follows:

\$50.	L 01829400A	\$50.	L 10931451A
\$50.	L 00125825A	\$50.	L 01931206A
\$50.	L 01829364A	\$50.	L 01757633A
\$50.	L 01772030A	\$50.	L 10866270A
\$50.	L 01859272A	\$50.	L 01866854A
\$50.	L 00636650A	\$50.	L 01866970A
\$50.	L 00280465A	\$50.	L 00399166A
\$50.	L 01386221A	\$50.	L 01860498A
\$50.	H 00213522A	\$50.	L 01803405A
\$50.	L 01859641A	\$50.	L 01866521A
\$50.	L 01861481A	\$50.	L 01862736A
\$50.	L 01772300A	\$50.	L 01757991A
\$50.	L 00216190A	\$50.	L 01865843A
\$50.	E 02851603A	\$50.	L 01865809A
\$50.	L 01861580A	\$50.	L 01758545A
\$50.	L 00354035A	\$50.	L 01772218A
\$50.	L 00025567*	\$50.	L 01866013A
\$50.	L 00241893A	\$50.	L 01865303A
\$50.	L 00353302A	\$50.	L 01866140A
\$50.	L 01779483A	\$50.	L 00574060A
\$50.	L 01866272A	\$50.	L 01866159A
\$50.	L 01866274A	\$50.	L 01931521A
\$50.	L 01931633A	\$50.	F 00420190A
\$50.	L 01931634A	\$50.	L 01827197A
\$50.	L 01931635A	\$50.	L 01772107A
\$50.	L 01864816A	\$50.	L 01859564A
\$50.	L 01865535A	\$50.	L 01865837A
\$50.	L 01866442A	\$50.	L 01931352A
\$50.	L 01931587A	\$50.	L 01444934A
\$50.	L 01864730A	\$50.	L 01863993A
\$50.	L 01856760A	\$50.	L 00636679A
\$50.	L 01451887A	\$50.	L 01772270A
\$50.	L 01866060A	\$50.	L 01772454A
\$50.	L 01829569A	\$50.	L 00848391A
\$50.	L 01931774A	\$50.	L 01321842A

\$50.	L 01463394A	\$50.	L 01867610A
\$50.	L 01931358A	\$50.	L 01858118A
\$50.	L 01866125A	\$50.	L 01361712A
\$50.	L 01931435A	\$50.	L 01772260A
\$50.	L 01865466A	\$50.	L 01828239A
\$20.	L 51320713A	\$100.	L 02827554A
\$20.	E 38021887A	\$100.	L 02827553A
\$20.	L 58167984A	\$100.	L 02827552A
\$20.	L 56385703A	\$100.	L 02827551A
\$20.	L 40079292A	\$100.	L 02909629A
\$20.	L 56396002A	\$100.	L 00092990A
\$20.	L 58167553A	\$100.	L 01817224A
\$20.	L 58165303A		
\$20.	L 58166828A	\$50.	L 01867467A
\$20.	L 58161601A	\$50.	L 01864206A
\$20.	L 42235280A	\$50.	L 01931966A
\$20.	L 58165226A	\$50.	E 02013245A
\$20.	L 42345832A	\$50.	L 01761111A
\$20.	L 49538068A	\$50.	L 01515937A
\$20.	L 58165252A	\$50.	L 01931783A
\$20.	L 55727449A	\$20.	L 58164835A
\$20.	L 42625694A	\$20.	L 58167226A
\$20.	L 56386304A		
\$20.	L 58165215A		
\$20.	L 19762019A		
\$20.	L 58165691A		
\$20.	L 57380058A		
\$20.	L 57380037A		
\$20.	L 58161897A		
\$20.	L 32103308A		
			\$5.950. Total (May 29, 1944)

**DEFENDANT'S EXHIBIT No. "A" Adm**

5-27-44

**May 24—1944**

Dr. Teed

Dear Doc.

This is to introduce Mr. Emery. This is the party I spoke to you about. If you can do anything for him I would consider it a favor.

W. J. GRAVEN

# S-6 (A)(B)(C)

5-27-44

S.D.S.

(On reverse side of letter)

5-27-44

Rcd from Dr. Teed

H. H. HANER

---

**DEFENDANT'S EXHIBIT No. "B"**

Manhattan Mont.

Feb 2

Dear Shirley

I arrived ok. stoped in Helena and I seen that party, and everything was alright, I seen this party here at Manhattan, and he was alright Say Shirley if you will wire me twenty dollars, I will see this party here again, and will come right home, I will give you 25 dollars soon as I get there; you no what I mean 25. for 20 dollars I no you cant beat that; or you wire me that and I will meet you in Helena wire 20 dollars anyway please and dont say any-

thing to any one about me being out of town: Just say Im out looking for a job and I will be back the first of next week: wire me that money to 401 N. Black St, Bozman Montana care of Lee Ping: Answer right back

Love

BUNNY

over

My address Bunny Doores, 401 N. Black St., C/o Lee Ping, Bozeman, Montana.

: Wire me right away:

Boric or Boracic acid [50]

---

### WESLEY DOORES

#### Direct Examination

\* \* \* \*

Q. Did you have any further conversation with him (Clayton) along the same line or about the same subject, either then or later?

A. Along about the latter part of January, I would say, it could have been earlier or later—I don't remember the exact date—I was asleep at the house one night when a fellow knocked on the door about 2 o'clock in the morning, and called George outside, and talked with him quite a while, and he came back in and asked at that time if I knew where he could get a federal badge or credentials; that he had someone that wanted to go on the Coeur d'Alene job he wanted me to go on, and I told him I didn't know where he could get any.

Q. Did you have any further conversation with Mr. Clayton at the house or down town with reference to the same subject?

A. Later on, I would say three or four weeks, maybe earlier, I was playing cards in Moore's Tavern one night when a fellow came in and watched the game for a while, and went out, and George told me at the time that was the fellow that wanted to go on the job at Coeur d'Alene, but he had backed out because he couldn't get any credentials for him.

Q. Are you acquainted with Ed Kelly?

\* \* \* \*

#### Cross Examination

Q. Was it in the month of January that this incident occurred in the Moore's card room where some man was pointed out to you?

A. No, sir; I think that was about the first of February.

Q. Will you describe the incident again?

A. The guy came in and sat there and was watching the card game and George said to me that was the fellow that wanted to go to Coeur d'Alene, and he backed out because he couldn't get a badge or credentials.

Q. What kind of a looking man was this?

A. A tall, slim, dark-completed man.

\* \* \* \*

Q. And this man you saw at the county jail (William Singer) was the same man that came in the Moore's card room about the first of February, and George Clayton said "There is the fellow that

I wanted to go to Coeur d'Alene but he backed out and wouldn't go because I couldn't get him a badge and [51] credentials?"      A. Yes, sir.

Q. And your best recollection of that date is the first of February?

A. Somewhere about that time.

\* \* \* \*

---

### DEFENDANT'S EXHIBIT "D"

This deed is statutory form for use in State of Washington only.

### WARRANTY DEED

The Grantor George Clayton, a bachelor of Spokane County of Spokane State of Washington for and in consideration of One diamond ring valued at \$3,000.00 Dollars in hand paid, convey and warrant to Sherley Doores the following described real estate, situated in the County of Spokane State of Washington:

The East fifty-four (54) feet of Tract Six (6) of First Addition to Edgerton, as per map thereof recorded in Book "L" of Plats, page 2, in the office of the County Auditor of said County.

Subject to

incumbrance of record; also subject to assessments for Orchard Avenue Irrigation District and to assessments by Spokane Valley Fire Protection District No. 1

Dated this 4th day of February 1944.

[Seal] GEORGE CLAYTON

(\$6.30 in Documentary Stamps affixed)

State of Washington,

County of Spokane—ss.

I, the undersigned, a Notary Public in and for the above named County and State, do hereby certify that on this 4th day of February 1944 personally appeared before me George Clayton, a bachelor to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes herein mentioned.

Given under my hand and official seal the day and year last above written.

[Notarial Seal] DEL CARY SMITH, Jr.

Notary Public for State of Washington Residing  
at Spokane [52]

(On reverse side of Warranty Deed)

614295A

### WARRANTY DEED

To

Cla 21

Indexed

36

Recorded

Doo

Compared  \*

Paged

\* In red.

State of Washington,  
County of Spokane—ss.

This is to certify that this instrument was filed  
for record in the office of the Auditor of Spokane  
County at the request of Grantee on this Mar 8,  
1944 at 4 30 PM, and Recorded in volume 510 rec-  
ord of Deeds of said County on page 313.

JOE A. STEWART  
County Auditor  
M. PEARSON,  
Deputy

Recorded by

L. BOWER,  
Deputy

Mail to Reg. 7225 E. Carlisle, City.  
Fee 60

---

DEFENDANT'S EXHIBIT No. E

This deed is statutory form for use in State of  
Washington only.

QUIT CLAIM DEED

3 30

3 —

—  
6 30

The Grantor Sherley Doores, unmarried at all  
times since acquiring title of Spokane, County of  
Spokane, State of Washington for and in considera-  
tion of Three thousand dollars - - - Dollars, in hand

paid, conveys and quit claims to George Clayton, a bachelor all interest in the following described real estate, situated in the County of Spokane State of Washington:

The East fifty-four feet (54) of Tract six (6) of First Addition to Edgerton, Spokane County, Washington, as per map thereof recorded in Book "L" of Plats, page two, in the office of the Auditor of said County.

**Subject to**

incumbrances of record; also subject to assessments for Orchard Avenue Irrigation District and to assessments by Spokane Valley Fire Protection District No. 1. [53]

Dated this 8th day of May, 1944.

[Seal]                    SHERLEY DOORES  
(\$6.30 in documentary stamps affixed)

State of Washington,  
County of Spokane—ss.

I, the undersigned, a Notary Public in and for the above named County and State, do hereby certify that on this 8th day of May 1944, personally appeared before me Sherley Doores, unmarried to me known to be the individual described in a and who executed the within instrument, and acknowledged that she signed and sealed the same as her free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal the day  
and year last above written.

[Notarial Seal] M. R. NORTON  
Notary Public for State of Washington Residing  
at Spokane

(On reverse side of Deed)

621312A      QUIT CLAIM DEED

To		
Doo	x Indexed	x
36	Recorded	
—	Compared	x*
Cla	x Paged	x

State of Washington,  
County of Spokane—ss.

This is to certify that this instrument was filed  
for record in the office of the Auditor of Spokane  
County at the request of Grantee on this May 16  
1944 at 12 46 PM and Recorded in volume 514  
record of Deeds of said County on page 3.

JOE A. STEWART  
County Auditor  
A. P. RATH,  
Deputy

Recorded by

F. LILLIE,  
Deputy.

Mail To Reg 7225 E. Carlisle, City.  
Fee 75 [54]

---

\* In red.

## DEFENDANT'S EXHIBIT No. F

This deed is statutory form for use in State of Washington only.

## WARRANTY DEED

The Grantor, George Clayton, a bachelor of Spokane County of Spokane State of Washington for and in consideration of Three thousand and no/100 - - - Dollars, in hand paid, conveys and warrants to Shirley Doores, a spinster the following described real estate, situated in the County of Spokane, State of Washington:

The east fifty-four (54) feet of Tract Six (6) of First Addition to Edgerton, as per map thereof recorded in Book "L" of Plats, page 2, in the Office of the County Auditor of said County.

Subject to incumbrance of record; also subject to assessments for Orchard Avenue Irrigation District and to assessments by Spokane Valley Fire Protection District No. 1

Dated this 16th day of May 1944.

[Seal]                  GEORGE CLAYTON

State of Washington,  
County of Spokane—ss.

I, the undersigned, a Notary Public in and for the above named County and State, do hereby certify that on this 16th day of May 1944 personally appeared before me George Clayton to me known to be the individual described in and who

executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes herein mentioned.

Given under my hand and official seal the day and year last above written.

[Seal] HARRISON H. BERKEY  
Notary Public for State of Washington Residing  
at Spokane [55]

---

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the above-named Court:

Will you please prepare, duly certify, and send to the United States Circuit Court of Appeals for the Ninth Circuit a transcript of the record in the above-entitled case for use in the appeal of the defendant George Clayton to the said Circuit Court of Appeals from the judgment entered in the above-entitled case, by including in said transcript the following items from the files and records of the above-entitled case in the District Court deemed necessary for a full and complete consideration of said appeal:

1. Indictment, filed August 11, 1944.
2. Arraignment and Plea of George Clayton, filed August 16, 1944.
3. Arraignment and Plea of Shirley Doores, filed August 16, 1944.

4. Arraignment and Plea of Shirley Doores, filed December 4, 1944.
5. Verdict, filed December 12, 1944.
6. Judgment and Sentence of George Clayton, filed December 11, 1944.
7. Motion in Arrest of Judgment, filed December 13, 1944.
8. Motion for New Trial, filed December 13, 1944.
9. Opinion of the Court on Defendants' Motion for New Trial, entered January 13, 1945.
10. Order denying Motion for New Trial and Motion in Arrest of Judgment filed January 15, 1945.
11. Notice of Appeal of George Clayton, filed January 17, 1945. (Grounds of Appeal annexed.)
12. Order fixing bond on Appeal, filed January 17, 1945.
13. Bail Bond pending determination of Appeal, filed January 17, 1945.
14. Order giving directions for preparation of record on appeal, entered January 19, 1945. (P. 699, Journal 16.)
15. Order for Extension of Time for the Settlement and Filing of Bill of Exceptions and Assignments of Error and Praeclipe, filed February 9, 1945.
16. Bill of Exceptions, settled and certified herein on April 16, 1945.
- 16<sup>1/2</sup>. All exhibits received in evidence.
17. Order settling and certifying Bill of Exceptions, filed April 16, 1945.

18. The Assignments of Error, filed herein on April 16, 1945. [56]

19. Praeclipe for Transcript of Record, filed April 16, 1945.

Said transcript of record to be prepared and filed in the United States Circuit Court of Appeals for the Ninth Circuit as required by law and the Rules of said Circuit Court of Appeals.

Dated April 16, 1945.

Respectfully,

HAROLD M. GLEASON

ROBERTSON & SMITH

By DEL CARY SMITH, JR.

Attorneys for defendant-

appellant George Clayton

Service of two copies of the appellant's Praeclipe is hereby acknowledged this 16th day of April, 1945.

EDWARD M. CONNELLY

United States Attorney, Attorney for the appellee,  
The United States of America.

[Endorsed]: Filed April 16, 1945. [57]

---

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD

United States of America,  
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of

Washington, do hereby certify the foregoing type-written pages numbered from 1 to 57 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and all other proceedings in the above entitled cause, as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, as called for by the appellant in his Praeclipe for Transcript of Record, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the Judgment and Sentence of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California.

I further certify that I hereto attach and herewith transmit the original Assignments of Error and the settled Bill of Exceptions in this cause.

I further certify that the cost of preparing and certifying the foregoing transcript is the sum of \$24.95, and that the said sum has been paid to me by Robertson & Smith, of Attorneys for the Appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane, in said District, this 20th day of April, 1945.

[Seal]                  A. A. LaFRAMBOISE  
Clerk, U. S. District Court, Eastern District of Washington.

In The District Court of the United States for  
the Eastern District of Washington, Northern  
Division.

C-7702

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE CLAYTON,

Defendant.

BILL OF EXCEPTIONS

COURT REPORTER'S TRANSCRIPT  
OF TESTIMONY

Be It Remembered that the above entitled and numbered cause came on for trial before the Hon. L. B. Schwellenbach, judge, at the hour of 3:40 o'clock p.m., December 4, 1944, at the court room of said court, in the Federal Building, at Spokane, Washington; the plaintiff appearing by Mr. Edward M. Connelly, the United States Attorney for said Eastern District of Washington, the defendant appearing in person and by his attorneys, Mr. Del Cary Smith and Mr. Harold Gleeson; both sides having announced they were ready for trial, a jury was then and there duly empaneled and sworn to try the said cause, the defendant consenting that the jury might separate during recesses and adjournments of court, the Court duly admonished the jury as to its duties during recesses and adjournments of court, and an adjournment was had to

the hour of 1:15 o'clock p.m., December 5, 1944, at which time, all parties being present as heretofore, on motion of the defendant witnesses were ordered excluded from the court room during the trial, all witnesses present being duly sworn, and admonished by the court in regard to their duty not to discuss the case, etc., the defendant consenting that Mr. Samuel Smith, of the Federal [1] Bureau of Investigation and the United States Marshal might remain in the court room during the trial;

Whereupon Mr. Connelly made an opening statement to the jury of the plaintiff's case, in part as follows:

#### OPENING STATEMENT

Mr. Connelly: \* \* \* The evidence will likewise show that in January the defendant George Clayton had talked with Wesley Doores, or Bunny Doores, the brother of Shirley Doores, and that he stated to him that this doctor from whom Shirley was getting morphine at Coeur d'Alene was good for a touch, and that they should be able to run up a pretty good score on him. That he asked Bunny Doores if he would impersonate a federal narcotic officer and go up there and put a scare into the doctor. That Bunny Doores refused to do this, stating that he was only out of the penitentiary at Walla Walla a short time, and he was on parole, and he did not care to get into any-

---

\*Page numbering appearing at foot of page of original Bill of Exceptions.

thing of that character or take any risk like that.

The evidence will further show that thereafter in March, 1944, the defendant George Clayton, on his invitation from Shirley Doores to Kelly to come—the evidence will show in March the defendant Kelly first met Shirley Doores. That he was introduced to her by George Clayton at the home occupied by the two. That on April 9th Shirley asked Kelly to come to the house, and that Clayton [2] drove Kelly out to the house. That Wesley Doores, or Bunny, was there, and Shirley Doores and Clayton and Kelly. That the four there discussed the proposition of putting a scare into Dr. Teed, as Clayton put it, by having Kelly impersonate a federal narcotic inspector, and to go out to Coeur d'Alene and tell him he had checked up on the Mike Sanders prescriptions, and that it looked bad for the doctor. That Clayton said to Kelly that Shirley had enough on the doctor to get a lot of money out of him. And that during the conversation Kelly agreed to attempt to impersonate a federal narcotic inspector and go out and contact the doctor. That all of the conversations concerning this matter were participated in by the four, Shirley, Clayton, Kelly and Bunny Doores. That during that conversation after Kelley had agreed to try it, Clayton said to Kelly "What are you going to say to the doctor when you meet him?", and that when they had gotten toward the end of their discussion, Clayton said to Kelly "Throw a good scare into the doctor and let Shirley do the rest."

During that conversation and before Kelly had agreed to it, to go along with it, Kelly said "Why don't you have Bunny do it?" And Clayton said "No, Bunny will not do on a deal of this kind. We are afraid the doctor may know him." And it was then agreed between the four of them [3] that Shirley would go to Coeur d'Alene and Kelly would go to Coeur d'Alene on an early bus the following morning. That at the conclusion of the conversation Clayton drove Kelly down town. That Kelly missed the bus that they had agreed upon by a few minutes, and took a taxicab and drove out along the route the bus takes and caught the bus and got on it. That Shirley was already on the bus. That they stayed apart for a time during the journey to Coeur d'Alene and later they sat together in a seat and came into Coeur d'Alene together.

We will have the bus driver here to testify to those facts. After they reached there, which was on April 10, the transaction about meeting the doctor and being introduced by Shirley took place. Shirley went to the doctor's office first, and Kelly followed and was sitting in the waiting room, and Shirley came out of his private office and they greeted each other, and she introduced him as Mr. Graven, the federal narcotic agent from Seattle.

Bunny Doores will likewise testify to the conversations that took place at the home during which it was agreed between the four that this transaction would be executed. Bunny will also testify that at Clayton's request he sat in the Halliday

Hotel to wait for a 'phone call where he would be called from the lobby, and that he stated over the 'phone things which Clayton had instructed [4] him to say when the call came.

The evidence will further show that the home in which Clayton and Shirley lived was originally purchased by George Clayton from a George Wiseman; that he conveyed it by deed to Shirley Doores on February 4, 1944; that on May 18th Shirley conveyed it back to George Clayton, and on May 18th George Clayton went to the Spokane Valley State Bank and paid a balance of \$1,261, and some cents due upon a mortgage on that property which was held by the bank.

The evidence will further show that Shirley Doores purchased an automobile which was later used by George Clayton, from the Barton Auto Company, during the month of April, 1944, and that she paid for the automobile the sum of \$1,700 in one-hundred dollar bills.

The evidence will further show that George Clayton maintained a bank account at the Old National Bank in Spokane, and that on April 12, 1944, he deposited in that account \$1,500.13, and that on May 1, 1944, that he deposited in that bank account, his own bank account, \$2,000 even, and that no such amounts in that figure had been deposited previously or thereafter, by Clayton, in a bank account.

The evidence will further show that after the arrest of Shirley Doores she asked to be brought to my office [5] in the company of Mr. Smith and

Mr. Albright and some police officer, and that she stated in the presence of these men and to me that she thought I wouldn't give her bum advice, and what would I suggest that she do. And that I replied to her that if it was as bad as it looked at that time I thought probably the best thing she could do would be to make restitution of the money, and she stood up and said to Mr. Albright and Mr. Smith "Come on; I think Ed is telling it to me straight" or "giving it to me straight", or something of that sort, "that is what I will do." And she took the men out to her home and secured a key to a safety deposit box at the Old National Bank, and that Mr. Bezona, the Marshal, went with Mr. Smith and the other officer and Shirley Doores, and that in a lock box in the Old National Bank under the name of Thelma West she turned the key over to Marshal Bezona and gave permission that the box be opened, and it was opened, and she turned over \$5,900 and some odd dollars, stating that was what she had lifted, or that she had secured from Dr. Teed. That a few days after that or a day or so after that, she also told some one of the officers that she had some of that money over at the First National Bank, and the Marshal went in the box that was opened and \$200 in currency was taken from that box. Each of those amounts have been preserved by the Marshal, and will be offered in evidence.

That in the main will be the government's evidenc

Mr. Smith: We will reserve our statement. [6]

(By direction of the Court the jury retired  
to the jury room.)

---

### EDWARD WILLIAM KELLY

called as a witness by the Plaintiff, was examined  
as follows:

By the Court:

Q. You are the Edward William Kelly who is  
named as one of the defendants in this indictment?

A. Yes, sir.

Q. You have entered a plea of guilty?

A. Yes, sir.

Q. You are now being called as a witness on  
behalf of the government. You understand the  
government cannot force you to testify unless you  
are willing to testify? A. Yes, sir.

Q. You can refuse to testify on the ground it  
might incriminate you? You understand that?

A. Yes, sir. I do.

Q. And despite that fact you are willing to  
testify? A. Yes.

(The jury then took its place in the jury  
box, the witness was duly sworn, and testified  
as follows:)

### Direct Examination

By Mr. Connelly:

Q. Will you state your name to the court and  
jury, please?

(Testimony of Edward William Kelly.)

A. Edward William Kelly. [7]

Q. At the present time where are you living?

A. In the county jail.

Q. Where were you born?

A. In Minot, North Dakota.

Q. How old are you? A. Thirty-four.

Q. Have you ever lived in Spokane?

A. I lived here the year previously—I was here the year previous to this thing.

Q. When did you first come here?

A. Sometime in July, last year.

Q. Have you ever met the defendant, George Clayton? A. Yes, sir; I have.

Q. Where did you first meet him?

A. In Spokane.

Q. When did you meet him, approximately?

A. Sometime in July, last year.

Q. What occupation did you follow while you were living in Spokane?

A. Well, none. I was a bartender.

Q. And when you met Mr. Clayton do you know what his occupation was?

A. No, I didn't know he had any.

Q. Have you ever met Shirley Doores?

A. Yes. [8]

Q. Where did you meet her?

A. I met her through Mr. Clayton.

Q. Did you meet her as Shirley Doores or some other name?

A. I don't remember whether it was Shirley Doores or Shirley Clayton.

(Testimony of Edward William Kelly.)

Q. Where did you meet her?

A. I don't remember where I met her.

Q. How long had you known Shirley Doores and George Clayton prior to April 9, 1944?

A. Well, I knew Clayton a long time before I knew Shirley Doores. I met her afterwards through him.

Q. Can you tell us approximately when you met her?

A. The first conversation I remember having with Shirley Doores was sometime after the first of the year in 1944, January or February, I think.

Q. Did you ever have occasion to visit or go to the home situated at 7225 East Carlisle, in this city? A. Yes.

Q. Can you tell us about the first time it was you went there?

A. I couldn't say the first time when I went there, no. I wouldn't know.

Q. Who was there when you went there?

A. Mr. Clayton was there the first time. I think I went out there with him the first I went out.

Q. Now directing your attention to on or about April 9, 1944, [9] can you tell us whether or not you had occasion to be out at that home on that day?

A. Yes, sir; I was out there.

Q. What were the circumstances under which you happened to be there?

A. I just went out to visit them or eat dinner. There was no special occasion that I know of.

(Testimony of Edward William Kelly.)

Q. Whom did you go there with?

A. I think I went out with Bunny, Shirley's brother, but I don't know whether I went with him or by myself. I know we were all there at the same time.

Q. Who was there after you got there?

A. Clayton, Shirley and Bunny, and myself.

Q. Do you recall whether or not you had dinner there at that time?

A. I don't think I did.

Q. Do you know what time of day or evening it was?

A. Yes, sir; I went out between 4 and 5 o'clock in the afternoon, Sunday afternoon.

Q. After you were there will you state whether or not there was any conversation with reference to a doctor at Coeur d'Alene, and, if so, state what that conversation was, and with whom?

A. Well, after I got there Shirley Doores brought this doctor's name—she didn't tell me the doctor's name until later—but asked if I would like to make some money, and [10] I told her yes, and she told me she had enough on this doctor for the sale of narcotics we could go up there and get some money from him, on the strength of what she knew.

Q. Who was there when she said that?

A. Clayton was there, and Bunny and myself.

Q. What, if anything, further was said in connection with that subject by you or any other party in your hearing and presence?

(Testimony of Edward William Kelly.)

A. We discussed it for an hour or an hour and a half, what I would do and what she would do and what Bunny would do.

Q. What, if any, part in that conversation did Mr. Clayton take?

A. Well, the only part he took in the conversation, he told me—we were talking about the doctor, and what would be the best way to approach him, and he said "I think the best way is to go up there and throw a good scare into him."

Q. Was there anything further said?

A. No, sir; there was nothing further said. I told him I did not think that would be the right way to approach it.

Q. Before you got to that point, what was suggested what, if any part, you would take in this matter?

A. I was supposed to take the part of W. J. Graven, the federal narcotic agent. [11]

The Court: How do you spell that name?

Mr. Connelley: The correct spelling of the man's name is G-r-a-b-e-n, but all I know of this case is that it has been pronounced G-r-a-v-e-n, as though there was a "v" in it.

Q. Who suggested you take the part of Graven?

A. Shirley Doores did, while we were discussing the thing.

Q. Do you recall anything further that Mr. Clayton had to say with reference to what you would do up there, and when you would go, or who would go?

(Testimony of Edward William Kelly.)

A. He didn't come right out and say who would go or when we would go, but he was there and knew when we would go.

Mr. Smith: I object to the answer as being a conclusion of the witness.

The Court: I will strike the last portion, that he was there and knew—whatever the last words were. I instruct the jury to disregard that portion of the answer.

Mr. Connelly: That portion that Mr. Clayton was present?

The Court: No.

Q. Will you tell us as nearly as you can recall, either the words or the meaning and substance of them, what plans, if any, were made about your going up to contact this doctor, and who was present when the plans were discussed?

A. Clayton was present, Shirley and Bunny, and myself were present when the plans were made, and we all took some [12] part in it.

Q. Can you tell us who suggested when you might contact this doctor, and pertaining to a narcotic inspector?

A. I think Shirley suggested it.

Q. What time was suggested?

A. Well, the time that was suggested would be the first thing next morning, because he was supposed to be leaving town and going on a vacation.

Q. Who told you that? A. Shirley.

Q. Will you state whether or not during the course of that conversation you agreed immedi-

(Testimony of Edward William Kelly.)

ately or otherwise about going up there and impersonating a narcotic inspector?

A. At first I said no, and after they talked a while I agreed to it.

Q. State whether or not you made any suggestion about anyone else impersonating a narcotic inspector instead of you?

A. Yes, sir; I said I thought Bunny could do it as good as I could or better.

Q. And what did Mr. Clayton say?

A. He said Bunny would be no good in that kind of a deal, because he thought Dr. Teed knew Bunny.

The Court: Who knew Bunny?

A. Dr. Teed knew Bunny.

Q. (Mr. Connelly): That is the statement you say Clayton made? [13] A. Yes, sir.

Q. And after that can you tell us whether or not you finally agreed to go ahead?

A. Yes, sir; I agreed to go ahead.

Q. How was it arranged you would get to Couer d'Alene, and what was said in that connection?

A. We agreed to meet each other next morning and take the bus. I was to get the bus from downtown and meet her, and she would catch the bus from the bus-stop out by her home.

Q. Approximately how far out is that home?

A. I wouldn't say. It is five or six miles anyway.

(Testimony of Edward William Kelly.)

Q. Do you know whether or not it is in the vicinity of the Trent Highway over into Idaho?

A. The bus goes right along that highway.

Q. Do you know how far the house is from the highway?

A. I would say two or three blocks.

Q. At any time that evening while you were discussing this matter was the name of the doctor whom you were discussing mentioned?

A. Yes, sir. It was.

Q. Who mentioned the name of the doctor?

A. Shirley finally mentioned his name.

Q. Do you know whether or not Mr. Clayton was there when she mentioned the name?

A. He was [14]

Q. And was Bunny there? A. He was.

Q. About what time did you leave that place that night? A. About 12 o'clock.

Q. How did you return into the city?

A. Clayton brought me down in the car.

Q. The next morning what did you do?

A. I got up and made an attempt to catch the bus downtown, and missed it. I got a taxi and went out and headed the bus off and got in the bus there.

Q. About where did you catch it?

A. I don't know the streets out there, but I caught it I think around Orchard Avenue, just ahead of where she got on.

Q. Was Shirley on the bus when you got on it?

A. No, sir.

(Testimony of Edward William Kelly.)

Q. How long after that was it she got on?

A. The very next stop.

Q. Did you and she sit together in riding to Coeur d'Alene?

A. I don't think we did right away. I got on the bus first and it seems to me the bus was crowded, and I sat by myself for a few minutes, and when she got on we got a seat together.

Q. Going back to the conversation at the house the evening before, can you tell us whether or not at any time anyone [15] used or referred to the name of Mike Sanders?

A. Yes, sir. His name was mentioned.

Q. Who mentioned it? A. Shirley.

Q. What did she say in connection with that name, what was said about Mike Sanders, and what, if anything, you would do in connection with Mike Sanders?

A. She told me that Dr. Teed had been writing narcotic prescriptions for a fellow named Mike Sanders, and there was no such man in existence.

Q. Was Mr. Clayton present when she told you that?

A. Yes, sir; he was. He was present at all times.

Q. What, if anything, was said by Mr. Clayton or Shirley or Bunny as to what you were to say or do about Mike Sanders when you met Dr. Teed?

A. Shirley said to go in and tell this doctor I knew that he had been writing prescriptions for

(Testimony of Edward William Kelly.)

narcotics for Mike Sanders, and I would ask him if he could produce Mike Sanders.

Q. Anything further?

A. No. There was nothing further then.

Q. Anything about arresting or not arresting the doctor?

A. There was nothing said about arresting him at all.

Q. Was anything said about mentioning or talking about arresting him? [16]

A. To threaten him with arrest.

Q. Who suggested that?

A. I don't remember who, but I think it must have been Shirley.

Q. I understood you to say that Mr. Clayton said to throw a good scare into the doctor. Was there anything else said by Clayton in that connection?

A. No, sir. That is the only words he said, was to throw a scare into the doctor.

Q. In that connection?

A. In that connection.

Q. Can you tell us whether or not anyone there that night said, "Throw a good scare in the doctor, and let Shirley do the rest?" A. Clayton.

Q. Was that at the same time you are referring to?

A. Yes, sir; that was at the same time.

Q. About what time did you and Shirley arrive at Coeur d'Alene? I mean the morning after this conversation?

(Testimony of Edward William Kelly.)

A. About an hour after I caught the bus. I think about 8 o'clock in the morning.

Q. And where did you go after you got off the bus?

A. We both went into the bus depot, me and Shirley both.

Q. Did you stay together after you left the bus depot? A. Yes, sir.

Q. Where did the two of you go? [17]

A. We went in the bus depot and sat down and had coffee.

Q. After you left the bus depot?

A. She went down to the doctor's office when she left the bus depot. That is where she told me she was going.

Q. Had you been in Coeur d'Alene before?

A. Once or twice I had been there.

Q. How long before?

A. It has been quite a while before that.

Q. Did you know where Dr. Teed's office was?

A. No, sir; I did not.

Q. Who told you where it was?

A. Shirley pointed it out to me.

Q. After Shirley went down to the doctor's office what did you do?

A. I stayed in the bus depot for a few minutes.

Q. How long?

A. About ten minutes.

Q. Then where did you go?

(Testimony of Edward William Kelly.)

A. I went from there up the street and bought a brief case in a drug store.

Q. Why did you do that?

A. She figured it would be a good idea to have a brief case with me when I went to see the doctor.

Q. You said "she" did? A. Shirley. [18]

Q. When did she tell you that?

A. At the bus depot.

Q. After you bought the brief case what did you do?

A. I went from there to the doctor's office.

Q. When you got to the doctor's office what did you find there?

A. There was a bunch of people in the reception, 6 or seven people, waiting to see him, and I sat there probably 5 or 10 minutes, and I got up and left.

Q. Was Shirley there?

A. She was in the doctor's private office.

Q. You say you got up and left?

A. I walked out. There was 6 or 7 people sitting there.

Q. Did you return later?

A. Yes, sir.

Q. And when you returned were there patients still in the office?

A. No, sir; they had left.

Q. Did you see anyone there after you entered?

A. No, sir; I think all the patients had gone when I got back.

Q. Did you see any persons at all?

(Testimony of Edward William Kelly.)

A. No, sir. The outer office was empty.

Q. What did you do?

A. I sat down and waited until Shirley came out of his office—him and Shirley came out together.

[19]

Q. After they came out will you tell us what was said and what occurred?

A. I got up out of the chair, and I told him who I was.

Q. What did you tell him?

A. I told him I was a narcotic agent.

Q. Did you use a name at that time?

A. I think I used the name W. J. Graven.

Q. Where did you get that name?

A. From Shirley.

Q. When did you get it from Shirley?

A. The night previous to this.

Q. Was Mr. Clayton there when she told you the name of the narcotic inspector?

A. Yes, sir; he was.

Q. After that what, if anything, did Shirley do?

A. While I was talking—started to talk to the doctor—she introduced me to the doctor, and told the doctor she had known Mr. Graven in Seattle.

Q. Did she use the name?

A. Yes, sir; she said "Graven".

Q. What else did she say about your business?

A. She told him who I was, a narcotic agent from Seattle?

Q. Then what occurred?

(Testimony of Edward William Kelly.)

A. She went out of the building, I guess, and I went into his private office. [20]

Q. Did you have any talk with him?

A. Yes, sir.

Q. Tell what it was.

A. I said "You are in quite a bit of trouble up here, aren't you, Doctor?", and he wanted to know what kind of trouble, and I explained to him about these narcotic prescriptions for Mike Sanders, and I asked who Mike Sanders was and where he was at, and he told me he was in Spokane, and I asked him if he could produce Mike Sanders, and he said he could.

Q. What did you say to that?

A. I said I had already talked to Mike Sanders, and Mike Sanders told me he had never received any narcotics from Dr. Teed.

Q. At any time there in that conversation did you produce or start to produce anything that you referred to as credentials?

A. No, sir; I didn't have nothing to produce.

Q. Were any credentials asked for?

A. No, sir; he never asked for credentials.

Q. What other conversation did you have with the doctor, and what did he say?

A. I told him that Mike Sanders told me he had never received any narcotics from him, and he still insisted he had wrote prescriptions for Mike Sanders, and he told me how large they were, he said about 50 grains about twice a week, [21] he thought, and I asked him how long he had been carrying this

(Testimony of Edward William Kelly.)

on, and he said since some time in January, and I asked him what was the trouble with Mike Sanders that he needed that much narcotics, and he told me, and it was then I told him that Mike Sanders said he had never received no narcotics from him.

Q. Did you say anything further what you would do about it?

A. No, sir. He asked me what I would do, and I told him I didn't know, I was going back to Spokane, and I would let him know.

Q. Was anything further said?

A. I asked him who else he had been writing prescriptions for. I told him I had been over to the drugstore, or was going to the drugstore, and was going to look, and he admitted he had wrote lots of prescriptions for different people, and he told me the bunch who he wrote for, and I don't remember, because I don't know the people.

Q. In talking about prescriptions, can you tell me whether or not you were talking about prescription for morphine or narcotics?

A. Yes, sir; morphine.

Q. Was there any further conversation there at that time?

A. No, sir. After he asked what I would do about it, I told him I didn't know; I was going to Spokane, and "I will let you know," and he said "I hope there will not be anything done about it. [22]

Q. He said that?

A. Dr. Teed said that.

(Testimony of Edward William Kelly.)

Q. Then what did you do?

A. I left his office and went down to the bus depot and bought a ticket to come back to Spokane.

Q. Did you see Shirley at Coeur d'Alene after that?

A. She came in the bus depot while I was there getting ready to leave for Spokane.

Q. Did you have any discussion with her?

A. She wanted me to wait and come back on the bus with her. She said, "I will see him, and you wait and come back with me," and I said I didn't care to stay any longer in the town, and I wanted to go, and I did.

Q. Was your meeting at the bus depot after you left Dr. Teed's office by any prearrangement?

A. No, sir; I don't think so.

Q. Can you tell us whether or not Shirley indicated to you where she was going when you said you were going back to Spokane?

A. She said she was going back up to see the doctor in regard to getting some money from him.

Q. Did you take the bus back to Spokane?

A. I took the bus then.

Q. Did you see Shirely after that that day?

A. Yes, sir; I seen her about three hours after that. [23]

Q. Did you see George Clayton?

A. I seen Clayton as soon as I got back to Spokane.

(Testimony of Edward William Kelly.)

Q. Where did you see him?

A. At Moore's Beer Parlour.

Q. Where is that?

A. On Main Avenue.

Q. Did you have any conversation with him?

A. Yes.

Q. Tell the Court and jury what that conversation was.

A. Well, he knew that I had left that morning.

Mr. Smith: I object to what he knew.

Q. Just what he said.

A. He said, "How did you come out up there?"

Q. What did you tell him?

A. I told him I didn't know; that she was still there.

Q. Was anything further said by him?

A. No.

Q. Did you see Bunny Doores around that day?

A. I seen him that day, but not right at the time I was talking with Clayton.

Q. Did you later see Shirley?

A. Yes, sir.

Q. Where did you see her?

A. She came to the same place in a taxicab. [24]

Q. The Moore beer parlor?

A. No, sir; the Turf, across the street. It was at Moore's I met Clayton, and him and me went across the street to get coffee.

Q. Did you have any arrangement to meet Shirley at the Turf? A. No, sir.

(Testimony of Edward William Kelly.)

Q. How long after you were in the Turf did she come in the taxicab?

A. I wouldn't say. I don't know how long it was, but sometime after that.

Q. Was Bunny Doores in the Turf with you and Clayton?

A. I don't remember whether he was or not at that time.

Q. Did Shirely come in the Turf?

A. Yes, sir.

Q. Did you have any discussion with her or hear any conversation between her and Clayton?

A. I had a talk with her.

Q. Was Clayton present? A. Yes, sir.

Q. Was he present within hearing?

A. I don't know. I wouldn't say whether he heard it or not. He was there.

Q. Where did the talk take place?

A. At the lunch counter.

Q. Can you tell us whether or not you and Shirley were [25] separated from Clayton?

A. No, sir. The three of us were sitting right there at the lunch counter.

Q. Tell us the conversation.

A. I asked her how she come out up there, and she said, "Not so good," she said, "I only got \$200." She said, "I got that in a check," and I told her to go and cash the check, and she said she didn't care to cash the check herself, and she was going to get somebody else to cash it for her, and I said, "Well, I am going on up to my room,

(Testimony of Edward William Kelly.)  
and when you get the money you can bring it up there."

Q. Is that all that was said, or do you recall anything else?

A. Instead of going to the room, she said to wait a few minutes and she would be back, and she said, "It may be we can go out to the house," meaning herself and me and Bunny.

Q. Was Bunny there at that time?

A. He came in before that time.

Q. Did Shirley give you any money at the Turf?

A. No, sir; she didn't give me anything at the Turf.

Q. Can you tell us whether anything was said by you as to the amount she had received?

A. Yes, sir, I said that didn't appear to be enough, but she said that was all he had given her, was \$300, as all his money was tied up in a road house at Coeur d'Alene. [26]

Q. Did you go to her house after that?

A. Yes, sir.

Q. Who was there?

A. No one was there. Me and her and Bunny went out in the cab, and she opened the door and the three of us went in the house together.

Q. What occurred when you got to the house?

A. When we got to the house she had the \$300 in cash by that time.

Q. What did she do with it?

A. She gave me \$100 and gave Bunny \$100 and took \$100 herself.

(Testimony of Edward William Kelly.)

Q. Was that all the money you saw, was \$300 in cash?

A. I didn't even see the \$300 in cash; she handed me five 20-dollar bills.

Q. And she handed the same thing to Bunny.

A. Yes, sir; I think so.

Q. Then what occurred?

A. We stayed around the house a while and some fellow came out and moved the furniture in or out while I was there.

Q. After you left do you recall where you went?

A. I didn't leave for quite a while. I came downtown with Clayton. He came while I was there.

Q. And you say you came back downtown with him? A. Yes, sir.

Q. Did you see Shirley after that at any time? I mean not [27] that day, but at a latter date?

A. I seen her—I didn't see her from that day until Thursday.

The Court: That was on Monday?

A. It was Monday when the first transaction took place.

Q. (Mr. Connelly): And where did you see her on the next occasion?

A. She came to my room at the Galax Hotel.

Q. What did she say then?

A. She said she got \$300 more from the doctor, and she gave me \$100 then.

(Testimony of Edward William Kelly.)

Q. Did you have occasion to go to Coeur d'Alene after that? A. Yes, sir; I did.

Q. When was that?

A. It was about a month after that, or more than a month.

Q. Did you have a conversation with Dr. Teed at that time? A. I did.

Q. Will you tell us what that conversation was?

A. Her brother told me she had got a lot more money from this doctor than she told us, and I asked how he knew, and he wouldn't tell me, and I said, "The best thing to do is to go up and see Dr. Teed again and find out for ourselves," and me and him went up together, and I went up and talked with Dr. Teed.

Q. What was the conversation?

A. I asked him how much money he had given Shirley Doores. [28]

Q. What did he tell you?

A. He told me he had given her quite a lot of money. He said, "I have given her nearly \$14,000."

Q. That was on what date?

A. I think it was about the 15th or 16th of May, I visited him.

Q. Prior to that time and after the time she gave you the \$100 at the Galax Hotel, did you see Shirley again?

A. Yes, sir. I seen her around town.

(Testimony of Edward William Kelly.)

Q. Did you have any further talks with her about money? A. No, sir.

Q. Did you see George Clayton?

A. Yes, sir; every day.

Q. Did you have any talk with him about this matter?

A. I didn't until after I had seen Dr. Teed, and I came back down from Coeur d'Alene. I didn't talk with either of them in regard to money.

Q. I will ask you whether or not you were in the vicinity of the Pedicord Hotel with Shirley Doores at any time?

A. Never in my life.

Q. After you talked with Dr. Teed did you do anything further or have any talk with him or get anything from him? On that particular occasion?

A. On that day I didn't get anything from him, no, sir.

Q. Did you see him later? [29]

A. Yes, sir.

Q. How much later? A. The next day.

Q. Were you alone or were you accompanied by someone? A. Bunny was with me.

Q. What was your conversation with Dr. Teed at that time?

A. I went back up to his office and talked some more in regard to how much money he had given her, and I asked him if he wasn't mistaken about the amount, and he said no, he knew what he had given her, and I told him all she had given me,

(Testimony of Edward William Kelly.)

and he said, "It looks like I have been shook down for my money," and I told him I didn't know what she and him had done, or how they had changed this money from him to her, and he started to explain it to me, and I told him there was no use explaining it to me because I had only got \$200 out of it, and that I was going to Spokane and see her and straighten it up.

Q. Did you see him again after that?

A. I got \$125 or \$150 from him that day.

Q. How did you get that?

A. I told him that there was a couple more narcotic agents that had been there that were going up to check them drug stores, and if he had any prescriptions in the drug stores they would pick them up, and I said I would see [30] they didn't come up if he would give me \$250, and he told me he didn't have \$250 in his pocket at that time, but he gave me \$125 or \$150, I don't remember which.

Q. And what about the balance?

A. He was to meet me at Spokane.

Q. Did he meet you? A. He did.

Q. Where?

A. In front of the Milwaukee Depot.

Q. Was that by arrangement?

A. Yes, sir.

Q. Did you get any more money from the doctor then?

A. He gave me \$145 at that time.

Q. How did he happen to give you \$145?

(Testimony of Edward William Kelly.)

A. When he gave me this \$125 I told him I figured he had caused me \$20 worth of trouble extra running back and forth to see him, and he admitted he had, and he gave me another \$20 bill he had in his hand.

Q. Did you talk with Shirley after you talked with the doctor? ,

A. Yes, sir. I talked with Shirley on about the 15th of May.

Q. Where did you talk with her?

A. At her home.

Q. Was Clayton there?

A. Clayton, myself and Bunny.

Q. Tell us that conversation? [31]

A. We went to the house, me and Bunny, and she was doing something around there, and Bunny asked her if she had any money—that is the way we first opened the conversation—and she said, "Where would I get any money," and he said, "You must have some money. I just came from the doctor, and he said he had given you about \$14,000," and she called George Clayton in. He was in the backyard doing something, and she called him in, and told him what we had told her, she had got more money, and he said, "I don't know how much money she got."

Q. Whom did he say that to?

A. I imagine he said it to Bunny and me both.

Q. Was anything further said?

A. No, sir. She said \$600 was all the money

(Testimony of Edward William Kelly.)  
she got, and "that is all you fellow will get. You have got all you have coming."

Q. Did you leave?

A. Yes, sir. We left.

Q. Did you have occasion to see Dr. Teed after that? A. Yes, sir.

Q. Did you see Shirley before you saw Dr. Teed again? A. Yes, sir.

Q. Where did you see her?

A. At her home.

Q. What conversation did you have with her at that time? [32]

A. I told her I heard we were all going to be arrested that day.

Q. Was Clayton there?

A. Yes, sir; and I told him also.

Q. What did they say?

A. They couldn't believe it. They wanted to know where I found it out, and I told them, and he suggested to Shirley we get in the car and go up to see Dr. Teed and find out if he had told the authorities, and she agreed to do it.

Q. Did she go with you?

A. Yes, sir; we went to Coeur d'Alene.

Q. How did you get there?

A. We drove up in her car.

Q. Where did you leave Mr. Clayton?

A. Out at the house.

Q. Was Bunny there?

A. No, sir.

Q. When you got there did you see Dr. Teed?

(Testimony of Edward William Kelly.)

A. She went up and seen him.

Q. Did you talk with him?

A. I started to talk with him, but I didn't have very much time. The sheriff came in and arrested me.

Q. How long were you in the office?

A. I was there about three minutes.

Q. How long was she there? [33]

A. She was there an hour and a half or two hours.

Q. She went to the office of the doctor without you? A. Yes, sir.

Q. Where did you remain while she was in the office?

A. On the street in the car.

Q. How did you go up?

A. She called me.

Q. Did you have any conversation with her or the doctor while you were there?

A. Yes, sir.

Q. What was it?

A. He told me he thought he was mistaken about the amount of money he had given Shirley. He said, "I guess I made a mistake." He said, "I think it was \$300 and not \$13,000."

Q. What did you say?

A. I didn't have time to say nothing. By that time the sheriff came in and arrested me.

Q. And he arrest you in the doctor's office?

A. Yes, sir.

Q. And you have been in jail ever since?

(Testimony of Edward William Kelly.)

A. Yes, sir; ever since.

Q. I believe you pled guilty to the charges against you in this indictment?

A. I have.

Q. You have not been sentenced? [34]

A. No, sir; I have not been sentenced.

Q. I will ask you whether or not you ever were intimate or associated with George Clayton prior to any of these transactions around the city here?

A. Oh, yes.

Q. State whether or not you ever went to a bank where he cashed checks?

A. Yes, sir. I went to a bank with him one time.

Q. Do you know where he worked during any of that time? A. Yes, sir.

Q. Where?

A. At Moore's tavern on Main Avenue.

Q. Doing what?

A. He claimed he was manager of the pool hall part of it.

Mr. Connelly: You may cross examine.

#### Cross Examination

By Mr. Smith:

Q. As I understand it, you came to Spokane in July, 1943? A. Yes, sir.

Q. And you have been in jail since your arrest about the 27th of May, of this year?

A. The 25th of May.

(Testimony of Edward William Kelly.)

Q. Between July and May you had no occupation? A. No.

Q. You mentioned something about being a bartender? [35] A. Yes, sir.

Q. But you did not follow tending bar in Spokane?

A. No, sir; not while I was in Spokane.

Q. Did you have any steady employment any place?

A. I wouldn't call it employment. I was working, but I wouldn't call it employment.

Q. Your principal occupation since you have been here was playing cards?

A. That is right.

A. And is that the occupation you followed for some years?

A. No, sir. I haven't followed it for many years.

Q. How many years?

A. Maybe two years.

Q. Have you any regular occupation outside of bar tending? A. No, sir.

Q. Have you ever been convicted of a felony before this time?

A. I don't know whether it was a felony or not. It would be a matter of record. I was convicted of a liquor case in North Dakota in 1934, but I don't know whether it was a felony or not. The District Attorney would know.

Q. Were you sentenced to a term of imprisonment in a penal institution?

(Testimony of Edward William Kelly.)

A. No, sir. I was sent to the county jail.

Q. When you came to Spokane did you go to work at Moore's Card Room? [36] A. I did.

Q. Playing cards there? A. Yes, sir.

Q. And that was where you became acquainted with George Clayton?

A. That is right. In Moore's card room.

Q. Do you remember who introduced you to him? A. No, sir. I don't remember now.

Q. And you say George Clayton had the title of manager of the card room?

A. That is what I imagine it would be, yes, sir.

Q. And the pool room, pool and cards—it is one of those regular working men's clubs on Trent and Main? A. Yes, sir.

Q. When was it that you went to the bank with Clayton?

A. I only went to the bank one time in my life with Clayton.

Q. When was that?

A. It was in May—April, I mean. Last year.

Q. When in April?

A. I couldn't give you the time, because I don't know. It was sometime between the 10th and 15th of April.

The Court: You said last year; April of last year.

A. April of this year, I meant.

Q. You mean last spring?

A. That is right. [37]

(Testimony of Edward William Kelly.)

Q. And you say on that occasion he cashed some checks? A. He did.

Q. Were they in a substantial amount?

A. I don't remember the amount. I think it was \$100 or \$200.

Q. What bank did he go to?

A. I don't know one bank from the other in Spokane.

Q. Where was it located?

A. On Riverside.

Q. Do you know the Old National Bank Building, the tallest building?

A. The bank he went to was on the north side of the street, on Riverside, down quite a ways.

Q. Did you have to go up steps to get there, to the bank proper?

A. I don't remember. It doesn't seem that we did.

Q. Did you go with Mr. Clayton to the bank at his request?

A. I don't think he requested me to go to the bank. I was standing there when he started and walked along with him.

Q. Was that before or after you and Shirley had been to Coeur d'Alene?

A. That was after.

Q. And you walked along with him up to the bank and did you return to Moore's with him?

A. No, sir. He went from there to another bank and I went with him. We went east up the street to another bank. [38] The other bank was

(Testimony of Edward William Kelly.)

east. I went in the bank with him but he went downstairs. I think there was some stairs he went down.

Q. And you waited there for him?

A. I waited in the lobby.

Q. And you went back to Moore's with him?

A. Yes, sir; that is right.

Q. And you think that was after you had been to Coeur d'Alene? A. I know it was after.

Q. The 10th of April? A. Yes, sir.

Q. How many times had you been out to Clayton's house on East Carlisle before the 10th of April? A. Quite a number of times.

Q. Who had you been out there with?

A. I had been out there with Clayton and Bunny.

Q. You are referring to Bunny Doores, Shirley's brother? A. That is right.

Q. And you have gone out there with Bunny on the bus? A. Yes, sir.

Q. Had you ever taken a meal at the house?

A. Yes, sir. I had had several meals there.

Q. And at that time you were employed at Moore's, the same place George Clayton was?

A. That is right. [39]

Q. That discussion that took place was on Sunday the 9th of April? A. That is right.

Q. The matter was brought up by Shirley?

A. That is right.

Q. What time of day was this?

(Testimony of Edward William Kelly.)

A. About 4:00 or 5:00 o'clock. It was between 4:00 and 5:00.

Q. Was it daylight or dark? A. Daylight.

Q. What room in the house were you in?

A. In the front room.

Q. The living room?

A. That is what I would call it. The first room you come into in the house.

Q. Were all of you present in the room?

A. Yes, sir.

Q. Bunny, Shirley and George Clayton and yourself? A. Yes, sir.

Q. Shirley brought up this matter about some doctor at Coeur d'Alene? A. Yes, sir.

Q. And Shirley spoke about the fact he would be an easy guy to get some money out of?

A. That is right.

Q. And you and Bunny were both sitting there and heard it? [40] A. Yes, sir.

Q. And Shirley mentioned the fact that you could impersonate a federal officer or narcotic agent?

A. She didn't say I could. She asked if I would.

Q. Shirley asked you if you would?

A. Yes, sir.

Q. Nothing was said about credentials there, was there? A. Not a word.

Q. Nothing was said about your having some papers or something, just anything that would do to cause the doctor to be so scared he wouldn't ask for any credentials?

(Testimony of Edward William Kelly.)

A. Not that I remember of.

Q. No conversation like that?

A. I don't remember any conversation in regard to credentials.

Q. And you suggested that Bunny should take the role? A. Yes, sir.

Q. And you say it was George Clayton who said Dr. Teed knew Bunny and he wouldn't do?

A. He said he thought he knew Bunny.

Q. Bunny at this time and for a long time before to your personal knowledge had been using narcotics? A. I never seen him do it.

Q. You knew he was a user?

A. All I knew what was, I had heard.

Mr. Connelly: I object to that as hearsay and not [41] proper cross examination.

The Court: The objection is overruled.

Q. Shirley mentioned the name of Dr. Teed in that conversation? A. She did.

Q. And Shirley mentioned Mike Sanders?

A. Yes, sir.

Q. And said Dr. Teed had been writing prescriptions for Mike Sanders, who was a non-existent person? A. Yes, sir.

Q. What time did you leave there?

A. About 12:00 o'clock that night.

Q. Was there any drinking going on?

A. No.

Q. How did you get from the house down town?

A. Clayton and Shirley drove me down in the car that night. I rode down with them.

(Testimony of Edward William Kelly.)

Q. What hotel were you staying at at that time?

A. The Galax.

Q. They left you there?

A. No; they went to Bunny's hotel first.

Q. You were with them? A. Yes, sir.

Q. And then where did you go?

A. After that they dropped me off on Riverside and I went [42] and got a cup of coffee and a sandwich and went to bed.

Q. Who called you next day to go to Coeur d'Alene? A. What do you mean?

Q. Who notified you?

A. The clerk at the hotel called me.

Q. He called you and said you had a 'phone call?

A. No. I agreed to get up and catch the bus that morning at 7:00 o'clock.

Q. You told Shirley the night before you would catch the 7:00 o'clock bus?

A. We had agreed to meet each other.

Q. And that agreement was with Shirley?

A. Yes, sir.

Q. And you did meet her and went to Coeur d'Alene? A. That is right.

Q. And all of these transactions took place you have testified to? A. Yes, sir.

Q. After you returned from Coeur d'Alene you went over to Moore's, did you not?

A. Yes, sir.

Q. And Clayton was there working?

A. He had just gotten there. I don't know what

(Testimony of Edward William Kelly.)

he was doing. He had his hat and coat on. I remember that.

Q. And he said "How did you come out?" [43]

A. Yes, sir.

Q. And you said "I don't know"?

A. Yes, sir.

Q. And that was all the conversation you had?

A. No, sir; we went across the street and had some coffee and waited for her.

Q. And she came? A. Yes, sir.

Q. How long was it before she came?

A. I don't remember that.

Q. And you and she had a conversation together at the counter? A. Yes, sir.

Q. On direct examination you were not sure that Clayton heard what was said or not.

A. I don't know whether he heard it or not.

Q. This is quite a large place and was pretty well patronized, was it not? A. Yes, sir.

Q. Quite a little noise?

A. I don't know about that.

Q. At any rate, you went up to—Where did you get the \$100 from?

A. Out at the house that day.

Q. When you and she and Bunny were there?

A. Yes, sir.

Q. And you saw her hand Bunny \$100? [44]

A. I don't know whether it was \$100. I seen her hand Bunny some bills. It was supposed to be \$100.

(Testimony of Edward William Kelly.)

Q. And you got \$100? A. I got \$100.

Q. How long were you there that day?

A. Oh, I was there a couple of hours.

Q. What were you doing all that time?

A. Just sitting there talking, me and Shirley and Bunny.

Q. What were you talking about?

A. About this transaction that had taken place at Coeur d'Alene.

Q. Clayton wasn't there?

A. He came in while we were talking. He came in while we were there.

Q. How long did you stay after Clayton came?

A. I didn't stay long. I rode back down with him.

Q. Do you know what he came for?

A. It was his home, and he just came.

Q. Shirley came to your room at the Galaxy Hotel on Thursday afternoon and gave you another \$100? A. That is right.

Q. Bunny told you his sister had gotten a lot more money out of Dr. Teed than she had stated to you? A. That is right.

Q. And that is when you talked with Dr. Teed?

A. That is right. [45]

Q. And Bunny went with you?

A. Yes, sir.

Q. And he was with you when you talked to Dr. Teed?

A. No, sir. He stayed out in the street.

(Testimony of Edward William Kelly.)

Q. Were you still posing as Mr. Graven, the federal narcotic agent?

A. I didn't pose as anybody. He took my word for it then, I suppose. I had met him before and there was nothing that made him believe any different.

Q. Was he talking to you as though he still believed you were a federal narcotic agent?

A. Yes, sir.

Q. At any rate, he gave you another \$150?

A. Yes, sir.

Q. After you told him you had a couple of more boys to fix up? A. Yes, sir.

Q. They were coming up to check up prescriptions? A. That is right.

Q. When you went to the house and told Shirley what you had found out, or what Dr. Teed had said, Clayton was out in the back yard?

A. He was, yes.

Q. And she called him in? A. Yes, sir.

Q. And what was it he said? [46]

A. She told him what me and Bunny just told her about this doctor giving her more money, and she said "What do you think about it?" and he said "I don't know how much money you got."

Q. And he asid "I don't know anything about this deal"?

A. No, sir; he didn't say that.

Q. He said "I don't know how much money you got"? A. That is the only words he said.

(Testimony of Edward William Kelly.)

Mr. Smith: That is all.

(Witness excused.)

---

## WESLEY DOORES

called as a witness by the Plaintiff, first duly sworn, testified as follows:

### Direct Examination

By Mr. Connelly:

- Q. Will you state your name, please.  
A. Wesley Doores.  
Q. And you have the nick-name of Bunny?  
A. Yes, sir.  
Q. That people sometimes call you?  
A. Yes, sir.  
Q. Where do you live?  
A. I am staying at the Pacific Hotel right now.  
Q. Where do you work?  
A. At the Trentwood Aluminum Company.  
Q. How long have you live in Spokane? [47]  
A. Off and on since 1936.  
Q. When did you come here the last time?  
A. It was in October, a year ago.  
Q. In 1943? A. 1943.  
Q. Are you a brother of Shirley Doores?  
A. I am.  
Q. Are you acquainted with George Clayton?  
A. I am.  
Q. How long have you known George Clayton?  
A. Oh, I believe about six years.

(Testimony of Wesley Doores.)

Q. You have been convicted of a crime?

A. I have.

Q. And are on parole at the present time?

A. I am on parole, yes, sir.

Q. When did you leave the institution and go on parole?

A. I believe it was about July 28th or 29th, 1943.

Q. That was the Walla Walla State Penitentiary? A. Yes, sir.

Q. When you left there did you come immediately to Spokane or later?

A. I came later. I worked for a while for Morris and Knudsen first.

Q. Where did you go to live first.

A. To 7225 East Carlisle.

Q. Who else lived there? [48]

A. George Clayton and my sister.

Q. Directing your attention to either the latter part of December of last year, or the first part of January of this year, I will ask you to state whether or not you had any conversation with George Clayton about a doctor up in Couer d'Alene?

A. I did.

Q. Do you know about when that was?

A. I would say along about the first part of January.

Q. What was that conversation, what did George Clayton say to you and what did you say to him?

A. Well, as near as I can remember, why I was talking to him at the house one day, and he told

(Testimony of Wesley Doores.)

me—he asked me if I knew Dr. Teed at Cour d'Alene, and I told him I didn't know him, but I knew of him. And he said, "Shirley has been getting narcotics off him, and Dr. Teed can be taken for a little money, if I could get some one to impersonate a federal man," and he asked if I would impersonate a federal man, and I told him I was on parole and I didn't want anything to do with it.

Q. Did you have any further conversation with him along the same line or about the same subject, either then or later?

A. Along about the latter part of January, I would say, it could have been earlier or later—I don't remember the exact date—I was asleep at the house one night when a [49] fellow knocked on the door about 2:00 o'clock in the morning, and called George outside, and talked with him quite a while, and he came back in and asked at that time if I knew where he could get a federal badge or credentials; that he had someone that wanted to go on the Couer d'Alene job he wanted me to go on, and I told him I didn't know where he could get any.

Q. Did you have any further conversation with Mr. Clayton at the house or down town with reference to the same subject?

A. Later on, I would say three or four weeks, maybe earlier, I was playing cards in Moore's Tavern one night when a fellow came in and watched the game for awhile, and went out, and George told me at the time that was the fellow that wanted to

(Testimony of Wesley Doores.)

go on the job at Couer d'Alene, but he had backed out because he couldn't get any credentials for him.

Q. Are you acquainted with Ed Kelly?

A. I am.

Q. How long have you known Ed Kelly?

A. Oh, I have known Kelly since I came to Spokane last October, a year ago.

Q. Have you been fairly intimate with him?

A. Fairly, yes.

Q. Now, I will ask you whether or not you saw Ed Kelly on April 9th of this year? [50]

A. I did.

Q. Where did you see him?

A. Well, George picked Kelly and I up in front of the Turf Cafe or pool room, whatever you would call it, and drove us out to the house for dinner.

Q. On April 9th?

A. Either April 9th or 10th. I couldn't be sure of the date.

Q. Who else was at the house besides you and George Clayton and Kelly?

A. My sister Shirley was there.

Q. When you say "George," do you mean the defendant, George Clayton? A. Yes, sir.

Q. Tell us anything that George Clayton said out there with reference to this doctor at Coeur d'Alene during that evening at any time.

A. Well, after dinner out there, we was talking, and George said he had a good score at Coeur d'Alene if he could get one of us to go on it, and

(Testimony of Wesley Doores.)

Kelly asked what it was, and George Clayton explained that Shirley had been getting prescriptions from Dr. Teed at Coeur d'Alene, and he had been writing them in a fictitious name, and if some one would impersonate a federal man he could take the doc for some money, and he wanted me to go over and I wouldn't go, and Kelly asked what he thought the doc would come up with, and he told him oh, \$800 or \$1000, somewhere [51] around there, I don't remember the exact amount, and Kelly asked him if he thought there would be any trouble, and George told him no, there wouldn't be any, and so Kelly agreed to go over there.

Q. What, if anything, was said by any of you as to how this transaction would be carried out and who said it, as you recall?

A. George went on to explain to Kelly at the same time after Kelly consented to go, he would drive him over, and Shirley was to go up to the doc's office and Kelly would come in a few minutes later, and Shirley would see Kelly and tell the doc that was a federal man in the waiting room.

Q. Was any name for the federal man used?

A. Graven, Mr. Graven, and that Kelly was supposed to tell the doc his name was Graven, and he was over there to check narcotic prescriptions, and it was pretty bad for the doc.

Q. Was your sister present at this conversation?

A. Yes, sir.

Q. Can you tell us whether or not the name Mike Sanders was used there?

A. That was one of the fictitious names she used.

(Testimony of Wesley Doores.)

Q. What?

A. That was one of the fictitious names the doctor had used in writing prescriptions. [52]

Q. Did your sister talk about that name that night?

A. George and Shirley both talked about it.

Q. What was said about how much money they expected to get out of this man?

A. Then George said he thought the doc could be taken for \$800 or \$1000.

Q. Who asked him about that?

A. Kelly did.

Q. Was there anything further said there that you can recall at this time?

A. George said he would drive them over next morning, but after talking about it he decided against driving them over. He said, "If there should be any trouble over there I wouldn't want my car to be seen over there."

Q. What arrangement, if any, was made about how anyone would get there?

A. So it was decided that they would catch the bus next morning, the first bus.

Q. Who was to go? A. Shirley and Kelly.

Q. Now do you know of anything else that was said there, about whether you were to take part in it?

A. At the same time when he explained to Kelly how it should be done, that Shirley would come back to the doc's office and tell the doc she would call Mike Sanders, and George [53] would be on

(Testimony of Wesley Doores.)

the 'phone at the Halliday Hotel to receive the call, but it was early in the morning, and he asked if I would answer the 'phone, which I did—I agreed to answer it.

Q. At the Halliday Hotel? A. Yes, sir.

Q. What 'phone call were you to answer?

A. A long distance call from the doc's office at Coeur d'Alene.

Q. Was that discussed that evening of the 9th, or at some later time?

A. That was discussed all at the same time.

Q. Now was there anything further said that night about this proposition?

A. Not that I recall right now.

Q. Did you stay out there that night?

A. No, sir. George drove Kelly and I back to town.

Q. George Clayton?

A. Yes, sir. I was staying at the St. Clair Hotel.

Q. Do you know where Kelly lived at that time?

A. I believe Kelly lived at the Galax, but he was still in the car when I left it.

Q. What, if anything, did you do the following morning early?

A. The following morning I got up around 6:30 and went out to Shirley's house and woke her up so she could catch the [54] bus, which she wanted me to do.

Q. Was there a telephone at your sister's house?

A. No, sir. And she got up and caught the bus

(Testimony of Wesley Doores.)

and George told her he would wait until she came back.

Q. Did you see either Kelly, your sister, or George Clayton later that day, the day you woke your sister up to get the bus?

A. After I came back to town I got the telephone call from Shirley about 11:30. About 1:00 or 1:30 I met Kelly at the Turf Cafe, and Kelly said he had got the early morning bus and went over and he had seen the doc, and during that time George came in, and he said everything had worked out as planned.

Q. Who told that to whom?

A. Kelly told it to George; that everything had worked out the way it was planned.

Q. What, if anything, was said about Shirley, your sister?

A. Kelly told George and I at that time he had got the first bus back from Coeur d'Alene, and had left Shirley over there, and she would be over later.

Q. At any time that afternoon did you see your sister?

A. Well, the three of us was back in the Turf about 4:00 o'clock, 3:00 or 4:00 or 5:00, somewhere along there, and Shirley drove up in a cab, and George went out and talked with her on the street a while, and then he came in [55] and he said the doc didn't come up with as much money as they thought he would, and he only gave her \$300.

Mr. Smith: Whom do you mean by "he"?

A. George Clayton.

(Testimony of Wesley Doores.)

Q. Did your sister come in?

A. She came on in then and talked to Kelly alone. She came in with George and talked to Kelly.

Q. How is that?

A. She and George came in the cafe and talked to Kelly about it.

Q. Did she say how much money she got?

A. She said she only got \$300.

Q. How long did you all stay there at the Turf at that time?

A. Oh, we stayed there—At that time?

Q. Yes.

A. Well, we left right after that. We got in the cab and went to her house.

Q. How many of you?

A. Shirley, Kelly and myself.

Q. Where did George Clayton go?

A. He went across the street to the card game he was running.

Q. After you got to the house was anything said further about this money?

A. She told us she only got \$300, and she gave me \$80 and gave Kelly \$100 of it.

Q. Did Kelly say anything about the amount of money she had [56] gotten?

A. He didn't say anything then, no.

Q. How long did you stay at the house?

A. Kelly left and came back to town, and I stayed later and George came about 9:00 o'clock and asked for some money and she gave him some, and I rode to town with Clayton.

(Testimony of Wesley Doores.)

Q. Did you have any conversation with him on the way down town?

A. He told me Shirley was going back next day to see the doc and if the doc gave her any more money he would give me some more.

The Court: What had you done to cut in on this?

A. All I had done was to answer the telephone at the Halliday Hotel. George was sick and he couldn't go.

The Court: Is that what you got the \$80 for?

A. Yes, sir.

Q. (Mr. Connelly): What was the telephone conversation you just referred to?

A. She asked me over the telephone if the federal man had talked to me, and I told her he had, and I didn't know the doc, and never got any narcotics from him, and I didn't want any part of it.

Q. How did you get that 'phone call—by what name? A. Mike Sanders.

Q. And where did you take the call? [57]

A. At the Halliday Hotel, in the hotel telephone booth.

Q. Were you in a room or in the lobby?

A. In the lobby.

Q. Who notified you there was a telephone call for you? A. The desk clerk.

Q. And what name did you use?

A. Mike Sanders.

Q. Did you have occasion to see George Clayton after that at any time?

(Testimony of Wesley Doores.)

A. Well, after that George and Shirley drove by my apartment one evening.

Mr. Smith: I would like to have the date.

Q. About what time was it?

A. I would say it was around the 20th or 23rd, somewhere around there.

Q. And what was your conversation then and with whom?

A. I believe it was Kelly that was with me. I couldn't be sure whether it was Kelly or not, but I believe it was, and George told me on the way down—George and Kelly said they had an appointment to see a party at the Pedicord Hotel, and we stopped there. They went inside and stayed around an hour. I don't know who they seen. And when they came back out I asked Shirley to loan me \$100, that I needed it, and she said she would in a day or so.

Q. What did Clayton say? [58]

A. He didn't say anything right at that time.

Q. Did he later? I mean with reference to money. Did he say anything later that day?

A. They said they would have some money in a day or two.

Q. Who said that?

A. Shirley said it and George also said it.

Q. Did you have occasion to see Clayton and your sister or either of them at the house any day after that?

A. Oh, I went out there a day or two later. I don't remember the date, but a couple of days after

(Testimony of Wesley Doores.)

that, and I went out to get the \$100, and George flashed his billfold and he had quite a few hundred dollars in the billfold, and he loaned me the \$100 before I left.

Q. What, if anything, was said about anything else at that time by Clayton?

A. Not that I remember right then.

Q. What, if anything, was said about the money he had on him? A. That he had?

Q. Where he got it or where it came from?

A. He didn't say where he had gotten it then.

Q. To refresh your recollection, I will ask you whether or not Clayton said anything about some little white tablets?

Mr. Smith: I object to counsel refreshing his recollection. He is doing very well.

Mr. Connelly: I object to counsel's statement that he [59] is doing very well.

The Court: I will overrule the objection.

Q. (Mr. Connelly): Did you hear the question?

A. I didn't get the last of it.

Q. I asked you whether or not Clayton made any reference to or mention of little white tablets at that time?

A. He flashed his billfold, and he said, "That ain't all I have got. I have some of the little white tablets." He always referred to narcotics as little white tablets.

Q. Now, at any time after that, any day after that, did you have occasion to see your sister and Mr. Clayton again?

(Testimony of Wesley Doores.)

A. Oh, I was out there two or three days later.

Q. As to whether or not either of them was going anywhere or stated they were going anywhere. Do you have any recollection of anything that was said?

A. I was there three or four days later and Shirley was getting ready to go some place, and I asked her where she was going, and she said George was going to drive her over to Coeur d'Alene to see the doc.

Q. Do you know whether or not they left the house at that time?

A. I asked George to drive up town, and he said he couldn't because he was going to drive Shirley to Coeur d'Alene, and they left in the car. I don't know where they went.

Q. Directing your attention to a couple of weeks after that, [60] did you have any conversation with Clayton and your sister with reference to money?

A. I was there almost every day, but this was a couple of days later. I would say around the first of May, and it could have been earlier or later, George was getting ready to go to Pasco, and he showed me what was \$6000, and he said he was going down there to buy a gambling joint.

Q. Do you know whether or not he left Spokane to go somewhere?

A. Him and a fellow named Sam Lavin left. They said they were going there.

Q. Did he say where he was going?

A. To Pasco, Washington.

(Testimony of Wesley Doores.)

Q. Did you see them after that or when they returned?

A. Oh, around two or three days later I was there when they came back.

Q. What, if anything, was said about buying a gambling place at that time?

A. Shirley asked if he got the place and George said he didn't.

Q. And what did Shirley say?

A. She asked for the money back, and George gave her some money and he said he was going to keep the rest and pay the mortgage off on the house or the garage.

Q. He gave her some money? [61]

A. Yes, sir. I don't know how much it was.

Q. Where did he take it from?

A. He had the money in his pocket.

Q. Was it currency or checks?

A. Currency—\$100 bills.

Q. Did you have occasion to see either of them at the house after that? A. Well—

Q. Either Clayton or your sister?

A. Oh, I was out there. It could have been the next two or three days; I was there nearly every day. George drove in and said to hurry up and get in and he would drive her over to Coeur d'Alene.

Q. Did either of them say why they were going there? A. No, sir.

Q. Did they leave at that time?

A. Yes, sir. They left in the car. I don't know whether they left town or not.

(Testimony of Wesley Doores.)

Q. Either at that time or afterwards, or around that time, will you tell us whether or not you had any conversation with Kelly about this transaction and about the amount of money that was involved?

A. I would say it was around the 17th or 18th of May, Kelly came to my place, and he told me "I think they got more money out of the doc than they said they got," and he [62] said, "They have been flashing money around town, and I know George didn't make it gambling," and he said he was going over to Coeur d'Alene to see the doc and find out what the doc had paid, and the next day he did get on the bus and go over.

Q. Did you go with him?

A. I went over with him.

Q. Did you go in the doctor's office?

A. No, sir.

Q. Where did you say?

A. I sat in the Sugar Bowl Cafe and had a cup of coffee while he was at the doc's office.

Q. Did you see Kelly again?

A. Kelly came back down and he said the doc told him he had paid Shirley \$14,000, and he said, "I know that George and Shirley got that much, and I am going back and demand my part of it."

Q. Did you come back to Spokane then?

A. We caught the bus back to Spokane and stopped at George's house on the way back.

Q. Were you with him? A. Yes, sir.

Q. Was there any conversation there between your sister and Kelly and Clayton?

(Testimony of Wesley Doores.)

A. Kelly told Shirley and Clayton what the doc said, and [63] George was mad and she was also, and Kelly told them if they didn't come through with his part of it he would put the finger on him, and George said to go ahead and put the finger on him.

Mr. Smith: George said go ahead and put the finger on him?

A. Yes, sir. He could do the time if Kelly could do it.

Q. What did your sister say?

A. She didn't say much.

Q. What was said, if anything, by anybody about going back to the doctor to prove the truth of Kelly's statements?

A. Kelly wanted her and him to drive over and Kelly would prove to her by the doc what he paid them.

Q. What did you say? I didn't understand you.

A. Kelly wanted George to drive him and Shirley to Coeur d'Alene, so he could prove to Shirley what the doc paid her, and George wouldn't do it.

Q. Did your sister agree to go? A. No.

Q. Did you have any further conversation with Clayton by 'phone or otherwise after that?

A. Oh, it was a day or two later George called on the 'phone and he said, "You and that other rat"—meaning Kelly—"better keep your mouth shut" and he said, "If you know what is healthy for you you had better get out of town, [64] or I

(Testimony of Wesley Doores.)

will bury you at Walla Walla. You know you are on parole and it wouldn't be hard for me to do."

Q. What else was said? Anything about any money?

A. He said, "You know I have got the money to do it with."

Q. Later did you learn that some policemen were looking for you?

A. Later I learned the authorities were looking for me and I left town.

Q. Where did you go?

A. To Montana. I was arrested at Bozeman, or this side of Bozeman, at a little town called Manhattan.

Q. Will you tell the jury whether or not you got any morphine from Dr. Teed on any trip you went over there on?

A. I never received no morphine on none of those trips.

Q. Did you at any time get any from Dr. Teed?

A. I went over about the 17th or 18th.

Q. Of what month?

A. Of May. I did get some morphine from him.

Mr. Connelly: You may cross examine.

#### Cross Examination

By Mr. Smith:

Q. Of what felony were you convicted?

Mr. Connelly: I object as being incompetent, irrelevant and immaterial. [65]

The Court: I will sustain the objection. There is only one question I will permit.

(Testimony of Wesley Doores.)

Mr. Smith: I do not know what it was, so I cannot safely ask the question.

Q. You are on parole from the state prison at Walla Walla, and were paroled in July, 1943?

A. Yes, sir.

Q. And you worked for a time for Morris & Knudsen? A. Yes, sir.

Q. Where did you work?

A. At Hapt, Washington.

Q. Where is that?

A. Well, it is about thirty miles this side of Wallula, Washington.

Q. Have you a brother named Robert Doores?

A. Yes, sir.

Q. Was he working for Morris & Knudsen on that same job? A. Not while I was there.

Q. Has he worked for Morris & Knudsen for a number of years?

A. Yes, sir, as far as I know.

Q. You did not see Robert Doores at that time?

A. No, sir. I did off and on but not out there on the job.

Q. Where was he working?

A. He was working for Morris & Knudsen somewhere in Oregon close to Pendleton, as near as I know. [66]

Q. You have mentioned your sister Shirley Doores, and I have mentioned Robert Doores. How many others were in the family?

A. There are three more—four more.

Q. What are their names?

(Testimony of Wesley Doores.)

A. Jean Doores and Ray Doores and Florence Doores. Two of them are dead.

Q. The ones you mentioned are living?

A. The ones that is living is Shirley, Jean, Robert and Russell Doores.

Q. And yourself? A. Yes, sir.

Q. How long have you been a user of narcotic drugs?

A. Oh, I used narcotics up to 1941; I would say around five years.

Q. You haven't used any narcotics since 1941?

A. One shot is all.

Q. When did you get that?

A. From Dr. Teed.

Q. The 17th or 18 of May?

A. Somewhere around there.

Q. Did Ed Kelly ever give you any narcotics he got from Dr. Teed? A. He never did.

Q. He never gave you any narcotics he got from Dr. Teed at [67] any time?

A. No, sir.

Q. During this period of time?

A. No, sir.

Q. You came back to Spokane in October?

A. Yes, sir.

Q. And you were out of a job?

A. I was, yes, sir.

Q. And broke? A. No.

Q. Did you have much money?

A. I had a little.

(Testimony of Wesley Doores.)

Q. At any rate you went out and stayed at the house on East Carslie where George Clayton and your sister lived? A. Yes, sir.

Q. How long did you stay there?

A. I stayed there off and on for a couple of months.

Q. Did you pay your board and room?

A. No.

Mr. Connely: That is objected to as not being relevant, material or competent.

The Court: Overruled.

Q. Your answer is "No"?

A. I didn't pay any. I was working for Clayton.

Q. You were working at the Moore's card room?

[68]

A. Yes, sir.

Q. Were you getting a salary?

A. Five dollars a shift, every time I played in the game.

Q. When did you leave George Clayton's home and move down town?

A. Well, I don't know the exact date when I did. I never did really leave there. I used to stay out there off and on, up until April.

Q. What time in the month of January was it that George Clayton first mentioned to you that this doctor had—What was the expression you used —was a good score? A. Yes, sir.

Q. Is that the expression that Clayton used?

A. Yes, sir.

(Testimony of Wesley Doores.)

Q. What time in the month of January did he mention it to you?

A. I would say it was around the first of January sometime. I don't know the exact date.

Q. Around the first of January?

A. I would say around the first.

Q. How long after New Years day?

A. I couldn't be sure about that; maybe a week.

Q. Within the first week in January he mentioned to you about this doctor at Coeur d'Alene?

A. That would be around the first. [69]

Q. And he told you that Shirley had been getting narcotics from this doctor, and he told you she had been getting it under the fictitious name of Mike Sanders? A. Yes, sir.

Q. And that he had been issuing her prescriptions in the name of Mike Sanders for some time?

A. Something like that.

Q. This conversation was the first week in January?

A. He said that she had been getting narcotics from him?

Q. That she had been getting narcotics from him and he had issued prescriptions and gave them to her? A. Yes, sir.

Q. In the name of Mike Sanders?

A. Yes, sir.

Q. And he told you there was no such person as Mike Sanders? A. Yes, sir.

Q. And the doctor would be easy to scare on that account? A. That is right.

(Testimony of Wesley Doores.)

- Q. He asked you if you knew Dr. Teed?
- A. He asked if I knew him, yes, sir.
- Q. And you told him you did not know Dr. Teed?

- A. I didn't know him, but I knew of him.
- Q. But you never had been in his office?
- A. No, sir.
- Q. And had never met the man personally?

[70]

- A. That is right.
- Q. At that time you had been off narcotics—I mean by that, not using narcotics since 1941?
- A. That is right.
- Q. You had not used any narcotics at all?
- A. That is right.
- Q. And you want us to understand the only time—the only shot, as you term it, of narcotics you had had was the 17th or 18th of May, of this year?
- A. That is right.
- Q. And you didn't know Dr. Teed?
- A. That is right.
- Q. And he asked you if you did?
- A. Yes, sir; correct.
- Q. Did he suggest to you at that time that you impersonate anybody?
- A. He just asked me if he could get some one to impersonate a federal man he could take him for a little dough, and asked about me going, and I said no, I was on parole, and I didn't want any part of it.

(Testimony of Wesley Doores.)

Q. You were afraid your parole would be revoked? A. That is right.

Q. And later on the same month again he brought up the subject again?

A. He just asked me then where he could get a federal badge [71] or some federal credentials.

Q. And you told him you didn't know?

A. Yes, sir.

Q. What reason do you suppose he had for asking you if you knew where he could get a badge?

Mr. Connelly: I object to that as not proper cross examination.

The Court: Sustained.

Q. Was it in the month of January that this incident occurred in the Moore's card room where some man was pointed out to you?

A. No, sir; I think that was about the first of February.

Q. Will you describe that incident again?

A. The guy came in and sat there and was watching the card game and George said to me that was the fellow that wanted to go to Coeur d'Alene, and he backed out because he couldn't get a badge or credentials.

Q. What kind of a looking man was this?

A. A tall, slim, dark complected man.

Q. Did you know the man? A. No, sir.

Q. Have you ever seen him since?

A. Yes, sir; I have seen him since.

Q. Where did you see him?

A. At the county jail. [72]

(Testimony of Wesley Doores.)

Q. Did you find out his name at the county jail?

A. William Singer.

Q. And this man you saw at the county jail was the same man that came in the Moore's card room about the first of February and George Clayton said, "There is the fellow that I wanted to go to Coeur d'Alene, but he backed out and wouldn't go because I couldn't get him a badge and credentials?" A. Yes, sir.

Q. And your best recollection of that date is the first of February?

A. Somewhere about that time.

Q. Nothing further was said about Coeur d'Alene by George Clayton then until the afternoon of April 9th, when you went out to the house?

A. Somewhere around April 9th. I couldn't be sure of the date.

Q. Do you remember the day of the week it was?

A. I know it was around April 9th or 10th or 11th. It was on Sunday, I know.

Q. And you had some previous understanding you were going out there that day?

A. George asked us out.

Q. He asked you and Kelly?

A. Yes, sir. He was always talking about cooking up a [73] dinner.

Q. Had you and Kelly been there before?

A. I think once or twice before, but I wouldn't say for sure.

Q. Your recollection isn't very good on that?

(Testimony of Wesley Doores.)

A. I have been there several times before. I don't know whether he was there before or after that time.

Q. Did you and Kelly go out there together on the bus? A. We have, yes, sir.

Q. Before or after this time?

A. I couldn't say whether it was before or after. George had taken us out two or three times in the car, and we went out on the bus two or three times.

Q. But this day you rode out with George Clayton in his car? A. Yes, sir.

Q. Did your sister have a car?

A. Yes, sir; but not at that time.

Q. She bought a car later on?

A. Yes, sir.

Q. This car you went in was George Clayton's car and had been his car for sometime?

A. Yes, sir.

Q. Had you gone there to have dinner?

A. Yes, sir.

Q. Will you repeat how this conversation came up about Dr. Teed at Coeur d'Alene? [74]

A. After dinner George told us he had a good score if he could get one of us to go on it, and Kelly asked what kind of a score it was, and he said Shirley had been getting narcotics prescriptions from Dr. Teed.

Q. I don't think the jurors can hear you. Will you start that again, please, and talk loud?

A. After dinner George told us that he had a good score at Coeur d'Alene if he could get one of us to go over there, and Kelly asked what kind

(Testimony of Wesley Doores.)

of a score it was, and George explained that Shirley had been getting narcotics from Dr. Teed on prescriptions under a fictitious name, and he could take the doc for some money if he could get one of us to impersonate a federal man.

Q. Did you say anything about not wanting to get mixed up in it because you were on parole at the time?

A. Kelly asked him why I didn't go, and George told him I was on parole and didn't want to go.

Q. Was anything said to the effect you couldn't go because Dr. Teed might know you?

A. No, sir.

Q. Nothing was said to that effect?

A. Not that I remember, right then.

Q. Well, can you remember any more of the conversation, Mr. Doores?

A. Only what I have told you. [75]

Q. Your sister Shirley had very little part in the conversation?

A. She didn't have much to say.

Q. She didn't have much to say?

A. No, sir.

Q. George Clayton was doing all the talking?

A. No, sir. George didn't do all the talking. She talked a little, too.

Q. But George led off with this subject by talking about this score over at Coeur d'Alene from Dr. Teed? A. Yes, sir.

Q. And he invited one of you to go?

A. Kelly.

Q. Was it agreed that night that—By the way,

(Testimony of Wesley Doores.)

was the name of Dr. Teed mentioned? I mean, was the name "Teed" mentioned in the conversation.

A. Yes, sir.

Q. Who mentioned the name of Teed?

A. George mentioned it and Shirley mentioned it.

Q. George mentioned the name of Teed?

A. Yes, sir. To start off with, yes.

Q. Was anything said by anyone about what Kelly should take with him in the way of credentials?

A. Not right then.

Q. Was anything said about how he should act or what he [76] should do?

A. Well, that he would come in the office about fifteen minutes after Shirley went in and sit down in the office and Shirley would look out and say, "There is a federal man out there" to the doc.

Q. Was any advice given him about what he should do with reference to the doctor?

A. George told him to tell him his name was Graven and that he was over there checking prescriptions, and it looked pretty bad for the doc.

Q. That is what George told him to say?

A. That is right.

Q. And did George say anything about throwing a good scare into him?

A. He said the doc would probably be scared.

Q. Did he say to throw a good scare into him?

A. Not that I recall.

Q. Who brought you down town after that meeting?

(Testimony of Wesley Doores.)

A. George brought Kelly and I down, and Shirley. I think Shirley was along.

Q. Did you and Kelly leave the car together?

A. Well, I don't just recall whether Kelly got out of the car at the same time or not. But I believe he did.

Q. Where was it talked about going to—about George Clayton driving Kelly and Shirley over to Coeur d'Alene? [77]

A. I didn't hear the question.

Q. Where was it discussed about George Clayton driving Kelly and Shirley over to Coeur d'Alene next day, where was the subject discussed, or was it discussed?

A. It was discussed the first day out there.

Q. Out at the house? A. Yes, sir.

Q. George agreed at that time he would drive them out in his car?

A. In the conversation George said he would drive them over, but later on in the conversation he backed out and it was agreed they would catch the bus.

Q. You were to be at the Halliday Hotel?

A. Yes, sir.

Q. And you went up to the house at 6:30 in the morning to wake your sister up so she could catch the 7:00 o'clock bus? A. Yes, sir.

Q. How did you get out there?

A. I took a cab.

Q. You took a taxicab? A. Yes, sir.

(Testimony of Wesley Doores.)

Q. It is five or six miles out in Spokane Valley?

A. Yes, sir.

Q. And did you take your sister to the Trent Road to the bus? [78]

A. No, sir. She walked from the house.

Q. Did you walk with her? A. No, sir.

Q. Did you see George Clayton that morning?

A. I did. He was in bed.

Q. He didn't even bother to get up?

A. No, sir. He said he was going to sleep until she came back, that his back hurt him.

Q. And you came back down town?

A. I did.

Q. And when you came back down town did you go right to the Halliday Hotel?

A. Not right away. I fooled around and then went to the Halliday about 9:30 or a quarter to 10:00.

Q. And you went to the clerk and told him you were Mike Sanders and were expecting a long distance call from Coeur d'Alene? A. Yes, sir.

Q. And the 'phone call came about 11:30?

A. Yes, sir.

Q. And in this conversation did your sister tell you where she was talking from?

A. She didn't say.

Q. In the conversation what was it she said about Dr. Teed, if anything? [79]

A. She just asked me if I had talked to a federal man, and I told her I had talked to the federal man.

(Testimony of Wesley Doores.)

Q. And did you tell her you had not got any narcotics from prescriptions written by Dr. Teed?

A. I told her I got no narcotics from Dr. Teed. I don't think prescriptions was mentioned.

Q. Just narcotics? A. Just narcotics.

Q. After you had had this little conversation with sister, you went over to Moore's card room?

A. No, sir. I drank a cup of coffee and met Kelly about 1:30.

Q. Where did you meet him?

A. In the Turf Bar of Turf Cafe.

Q. How long a time did you spend with Kelly?

A. We sat there probably forty-five minutes—maybe an hour—when George came in.

Q. You and Kelly sat there about forty-five minutes to an hour until George came in?

A. Yes, sir.

Q. And when George came in did he speak to Kelly?

A. He spoke to both of us, and he sat down and had a cup of coffee with us.

Q. What did he say to Kelly?

A. He asked how things went and Kelly said everything went the way it was planned, and the doc wasn't suspicious. [80]

Mr. Connelly: I didn't hear you.

A. Kelly explained to George everything went according to the way it was planned.

Mr. Connelly: Did I hear the word "suspicious"?

(Testimony of Wesley Doores.)

The Court: He said Kelly told George everything had gone the way it was planned and the doctor was not suspicious.

A. That is right.

Q. That is what Ed Kelly told George Clayton in your presence at the Turf Cafe?

A. Yes, sir.

Q. After you and Kelly had been sitting there about forty-five minutes or an hour drinking coffee?

A. Yes, sir.

Q. And you stayed there until your sister came?

A. No, sir; we fooled around town. We maybe went across the street to Moore's; anyway, we met at about 4:30 or 5:00.

Q. In this conversation at the Turf Cafe, Kelly didn't say something to Clayton, "I don't know; I haven't seen Shirley yet"?

Mr. Connelly: I object as not being proper cross examination.

The Court: The objection is overruled.

A. I didn't get you. (Question read) Well, George asked where Shirley was and then Kelly told him he had left [81] Shirley at Coeur d'Alene.

Q. But he said everything had gone as planned and the doctor was not suspicious?

A. That is right.

Q. When you went into the Turf was Kelly already there or did he come in after you were there?

A. Well, I believe that I was already in the Turf when I met Kelly—when Kelly came in.

(Testimony of Wesley Doores.)

Q. Did Kelly come in alone? A. Yes, sir.

Q. And as I understood it, you and he talked together—you and Kelly talked together forty-five minutes or an hour?

Mr. Connelly: That is unnecessary repetition. It has been asked five times now.

The Court: Overruled.

Q. You were there forty-five minutes or an hour before Clayton showed up?

A. Thirty or thirty-five minutes. I wouldn't be sure.

Q. Did you see the direction from which Kelly came? A. I did not.

Q. Did he tell you he had just arrived in town from Coeur d'Alene?

A. He said he had taken the first bus back from Coeur d'Alene, whatever one it was. [82]

Q. Did he tell you where he got off the bus?

A. He didn't say.

Q. Did he tell you whether he had been to Moore's Tavern before he came to the Turf?

A. I don't know whether he did or not.

Q. Do you know whether he came in alone?

A. Yes, sir.

Q. When Shirley came then were you all there yet?

A. We had met there then, George Clayton, Kelly and myself.

Q. All three of you were there together?

A. Yes, sir.

Q. And you said something to the effect that

(Testimony of Wesley Doores.)

George Clayton went out on the sidewalk in front of the place and talked with Shirley?

A. Yes, sir.

Q. How long was he there?

A. I don't remember, but a few minutes, ten or fifteen minutes; somewhere around there.

Q. Were they in your vision at the time?

A. They was.

Q. When George Clayton came back in did she come in with him? A. She did.

Q. Who spoke the first words to you or Kelly?

Mr. Connelly: When?

Q. When they came in? [83]

A. George did, I believe.

Q. What? A. George did, I believe.

Q. What did he say?

A. He just said, "The doc didn't come up with as much money as we figured he would."

Q. Did he say how much the doc had come up with?

A. No, sir; he didn't say. Shirley spoke up and said she had gotten \$300 from the doc.

Q. Was anything said about dividing up at that time? A. Not right then.

Q. Did you see the money? A. I did not.

Q. Was anything said about whether the money was in checks or in currency?

A. I believe a check was mentioned, but I don't recall what it was.

Q. Was anything said about having to get some-

(Testimony of Wesley Doores.)

body to negotiate a check or cash a check that you can remember? A. I don't recall.

Q. You don't remember that? A. No.

Q. Would you say it did not—

Mr. Connelly: I object as not proper cross examination. [84]

The Court: Overruled.

Q. You don't recall anything about something being said with respect to a check would have to be cashed and Shirley didn't want to negotiate it in her own name, or something like that?

A. Something was mentioned about a check, but I don't recall what was said about a check.

Q. Then you went out to the house together?

A. Yes, sir.

Q. How did you go? A. In a cab.

Q. How long did you stay at the house?

A. I stayed there until about 9:00 o'clock.

Q. Did you separate from the time you three left the Turf before going out to the house at all?

A. No, sir. Not that I remember.

Q. Shirley did not leave you and go any place?

A. Not that I remember she didn't.

Q. Is there a cab stand there by the Turf?

A. We left, I believe, in the same cab she came up in. She had the cab wait for us.

Q. Had she kept the cab waiting there all the time you were in the Turf?

Mr. Connelly: That is objected to. The witness has not indicated any time they were in the Turf after Shirley [85] arrived.

(Testimony of Wesley Doores.)

Q. Had she kept the cab waiting there during the ten or fifteen minutes you said she talked to Clayton on the street?

A. She had the cab waiting there then.

Q. And also during whatever time was consumed while you four were in the Turf?

A. It might have been ten, twelve or fifteen minutes all together during the time she was talking on the sidewalk and during the time we talked in the Turf.

Q. And you went out to the house on East Carlisle in this cab? A. Yes, sir.

Q. As soon as you got there did she divide up the money? A. Not right away.

Q. Who brought up the subject of dividing the money?

A. I don't recall who did. I know it was divided up.

Q. She told you she had \$300. A. Yes, sir.

Q. And she gave Kelly \$100?

A. And me \$80.

Q. Was any explanation given why you didn't get \$100, too?

A. Oh, I don't recall what it was now.

Q. There was something said?

A. There was a briefcase brought or something —something she [86] had bought took out for.

Q. That was taken off the top before you got your cut? A. Yes, sir.

Q. You got \$80 and Kelly got the full \$100?

Q. And Shirley kept the \$120 for her share?

A. Yes, sir.

(Testimony of Wesley Doores.)

Q. Of the \$300 she had gotten?

A. Yes, sir.

Q. And did she say at the time the doctor promised he would pay another \$300 later?

A. She said something about getting more money from the doc next day.

Q. When did you get your cut out of the next money?

A. I seen them the next day. I seen George and Kelly on the street.

Q. Where were they?

A. I don't know; on Main someplace, by Moore's or by the Turf.

Q. Did you have some conversation with Goerge Clayton and Kelly at that time? A. Yes, sir.

Q. What did they say and what did you say?

A. George said he drove Shirley over to Coeur d'Alene and she got some more money and gave Kelly \$60 to give to me.

Q. Did Kelly give you the \$60? [87]

A. Yes, sir.

Q. In Clayton's presence? A. Yes, sir.

Q. And that made \$140 you had got?

A. Something like that.

Q. When was the next time you got any more money?

A. I didn't get any more after that until I borrowed \$100 off of George.

Q. You considered that a loan?

A. Yes, sir; a loan.

Q. How long after that?

(Testimony of Wesley Doores.)

A. Oh, I don't know. Around the 20th or 23rd; somewhere around there.

Q. Did Kelly tell you how much money he got out of the second payment?

A. He didn't say.

Q. Did you ask him whether he got \$60 or more?

A. I believe he did say he got \$60.

Q. He had gotten \$60, too?

A. I believe so.

Q. And was the second payment supposed to be \$180?

A. I don't know what the second payment was supposed to be.

Q. Were you told what it was?

A. I wasn't told, no.

Q. Were you told that the first payment was \$300 and you were [88] not told the second was to be \$300?

A. I wasn't told the first payment was \$300.

Q. Were you not told the second payment was to be \$300 as well?

A. No, sir; I don't believe I was. They may have mentioned it, but I don't recall whether it was mentioned or not.

Q. At any rate, you got \$60, and you understood that was what Kelly got?

A. Yes, sir. I understood that was what he got.

Q. How long after this first day was it you got the second payment?

A. I got one one day and the \$60 the next day.

(Testimony of Wesley Doores.)

Q. You got \$80 the first day and \$60 the next day? A. Yes, sir.

Q. And \$60 you got was paid to you by Kelly?

A. Yes, sir.

Q. In George Clayton's presence on Main Avenue?

A. Yes, sir; at the Turf Cafe.

Q. In connection with this \$100 loan you say Clayton made to you, he mentioned, you say, some little white tablets? A. Yes, sir.

Q. And you said that is what he called morphine? A. Yes, sir.

Q. Did he show you any little white tablets?

A. No, sir; he didn't. [89]

Q. In what connection did he bring that up? Why did he mention the little white tablets?

A. He flashed his billfold and he had a whole billfold of money, and he said, "That ain't all I got. See what I got. That ain't all I got. I got some of those little white tablets."

Q. As a matter of fact, George Clayton usually has money? A. Yes, sir.

Q. And did have long before this matter came up?

A. I have always seen him with a little.

Q. You always made it a point to borrow quite a bit from him, did you not?

Mr. Connelly: I object to that as being incompetent, irrelevant and immaterial. It has nothing to do with this case.

The Court: The objection is sustained.

(Testimony of Wesley Doores.)

Q. When did you and Kelly get together again after he gave you the \$60?

A. The next time I seen him—

Q. After he gave you the \$60?

A. I probably seen him on the street different times. The next time I know for sure when I seen him was when he drove by my apartment.

Q. And that was about the middle of May?

A. That was around the 20th or 23rd. It could have been later than that. [90]

Q. The 20th or 23rd of April?

A. Of April, yes, sir.

Q. And that was when he told you he suspected that you and he had not got your fair cut out of that money?

A. Do you mean Clayton or Kelly?

Q. Kelly. A. No—

Q. I asked you when after this second day when Kelly gave you the \$60 at the Turf Cafe, when did you and Kelly get together or meet casually?

A. It was about the 17th or 18th of May he came to my apartment.

Q. In other words, more than a month later?

A. We met off and on and talked, and probably met a dozen times since then.

Q. That was when Kelly told you he had reason to believe he had not got a fair share out of it; that your sister had got more money than she admitted?

A. He said he thought they got more money than they told him they had.

(Testimony of Wesley Doores.)

Q. Who brought up that conversation?

A. I don't know. Maybe both of us did.

Q. Did he state to you Shirley had got more money than she told you, or did you state to him —Who first stated it?

A. I believe Kelly did. [91]

Q. You didn't go to Kelly and tell him you had reason to believe and you knew that Shirley had gotten a lot of money out of this doctor she had not accounted for?

A. Kelly mentioned it two or three times.

Q. Before or after this time?

A. He suspicioned before this that he had got cut short on this.

Q. You did not say to him, "I know that" or "I found it out"?

A. Not on that occasion, I didn't. I believe he came to my apartment. That was where we talked anyway, about it.

Q. He came to your apartment and that is where you were talking about it?

A. Yes, sir.

Q. Well, later on when was it you went to Coeur d'Alene with Kelly?

A. It was next day.

Q. You and he decided you and he would go up and find out?

A. He decided he would go up and find out and I went along with him.

Q. Just for the ride?

A. Just for the ride.

(Testimony of Wesley Doores.)

Q. And you wanted to find out if you had got cut out of anything, too?

A. I wasn't cut out of nothing.

Q. What? [92]

A. I wasn't cut out of anything.

Q. But you did go with Kelly, and you sat in the cafe while he talked with the doctor?

A. Yes, sir.

Q. And he came back and reported to you the doctor said he had given your sister almost \$14,000?

A. That is right.

Q. When you came back to town where did you go then?

A. I don't recall just where we did go then when we got off the bus.

Q. You don't recall where you went?

A. Where we got off the bus and where we went—You mean when we came back?

Q. You and Kelly?

A. We stopped at George's house on the way back.

Q. Was George there? A. Yes, sir.

Q. And Shirley? A. Yes, sir.

Q. What part of the house were you in?

A. Shirley was in the front room and I believe George was out back or on the lawn or in the garage.

Q. When you came in did George come in the house?

A. Yes, sir. Shirley called him in.

Q. And when he came in what did he say? [93]

(Testimony of Wesley Doores.)

A. Kelly told him he had been to see the doc, and George was mad.

Q. What did George say?

A. Kelly told him if he didn't come up with his part of the money he would put the finger on him.

Q. And George said, "Go ahead and put the finger on me"?

A. Yes, sir. That he could do the time if Kelly could do it.

Mr. Connelly: I could not hear you.

A. He said, "Go ahead, put the finger on me. I can do the time if you can."

Q. Did Kelly ask Shirley how much money she had gotten?

A. Yes, sir; I believe so.

Q. What did she say?

A. She said she didn't get that much.

Q. Did Kelly ask Clayton how much she had gotten? A. I believe he did.

Q. What did Clayton say?

A. I don't believe George said anything about the amount of money she got.

Q. Did he say something to the effect, "I don't know how much money she got"?

A. I don't recall whether he said that or not.

Q. You can not remember his saying that?

A. Just whether he said that or what he did say right then, I don't remember.

Q. And Kelly asked George to drive Shirley and him over to [94] Coeur d'Alene to see the doctor? A. That is right.

Q. And George said he would not do it, that he

(Testimony of Wesley Doores.)

didn't want his car seen in Coeur d'Alene?

A. That is right.

Q. It was some days later he called you on the telephone? A. Yes, sir.

Q. Where did he call you?

A. At my apartment on East Pacific.

Q. And in the conversation he said, "You and that other rat keep your mouths shut, or I will see you go to the penitentiary, and I have the money to do it"?

A. He didn't say it just like that. He said, "You and that other rat had better keep your mouth shut, and if you know what is healthy for you you had better get out of town."

Mr. Smith: I would like to reserve the right to further cross-examine this witness, but I have finished at this time.

The Court: Any redirect examination?

Mr. Connelly: Yes, but I would prefer to do it when he finishes.

(Witness Excused) [95]

(Whereupon an adjournment was had to the hour of 1:15 o'clock p. m., December 6, 1944, at which time, all parties being present as heretofore, including all the jury, the trial was resumed as follows, to-wit:)

Mr. Connelly: I wish to recall Mr. Kelly for redirect examination.

The Court: Did you have any further cross examination?

Mr. Smith: Not at this time, Your Honor.

## EDWARD WILLIAM KELLY

recalled as a witness by the Plaintiff, further testified as follows:

## Redirect Examination

By Mr. Connelly:

Q. Directing your attention to the afternoon or evening of the 10th of April, when you testified the \$300 was supposed to be divided between you and Wesley or Bunny Doores, can you tell us what, if any, part Mr. Clayton took in any conversation about the split or division of that money?

A. Well, he came out there—he entered the house right after Shirley divided the money with me and Bunny, and she told George that she thought Bunny was dissatisfied with his share of the money. She wanted to know what he thought Bunny should get out of that much money.

Q. What did he say?

A. And he said he thought Bunny should have made that a [96] complimentary play.

Q. For what reason, if he said?

A. He didn't give no reason.

Q. Directing your attention to April 15 or about April 15, will you state whether or not you had occasion to go to Pasco with Mr. Clayton?

A. I did.

Q. Either before or during the time you were on that trip, did he state his purpose in going down there, and, if so, what did he say?

A. He said he thought he would go to Pasco and see if he could buy a place of business for a beer joint.

(Testimony of Edward William Kelly.)

Q. Who made the trip?

A. Myself and Clayton and some woman named Rita Taylor.

Q. How long did you stay at Pasco?

A. We left here Saturday evening and came back Monday afternoon.

Q. Who returned with you?

A. A man named Sam Lavin?

Q. Did you know him before? A. I did.

Q. I will ask you if after we left here yesterday you asked to see me, and called attention to a matter I neglected to ask you about yesterday?

A. That letter.

Q. What? [97]

A. A letter I had wrote you.

Q. When did you write it?

A. Sometime in August.

Q. With reference to any conversation you had with George Clayton that I neglected to ask you about yesterday, and which you referred to in your letter, will you tell us what that conversation was?

A. Yes, sir. I met him down town after me and Bunny had been up to Coeur d'Alene and come back and seen Shirley.

Q. About when was that?

A. I think in May, around the 16th of May.

Q. Tell us what the conversation was, all of it.

A. We had had an argument with her in regard to the money out at the house, and she told us to leave the house, which we did, and I seen Clayton down town, and he took me in his car and we talked

(Testimony of Edward William Kelly.)

in regard to this money, whether she had gotten more than \$600 or not, and he said he knew she didn't get more than \$600. He said "I think she is telling the truth."

Q. What else did he say?

A. He said Bunny was the one that was doing the talking, and telling me, and he had gotten enough money, and the best thing Bunny could do was to shut his mouth and take it easy or he would have somebody come in here and see he did keep quiet. [98]

Q. What, if anything, did he say about Bunny getting any money out of this transaction, in that conversation, about how much money he thought Bunny should have gotten out of this transaction?

A. He said what Bunny did he wasn't entitled to no money.

Q. About his own wishes in the matter—Clayton's wishes?

A. He said if he had his way Bunny would not have been mixed up in it, and he would have got no money.

Q. What, if anything, was said by Clayton about keeping you and Bunny quiet, or getting somebody to keep you quiet?

A. He said he would get somebody to come in here and keep us quiet.

Q. Directing your attention now to the evening that you referred to, on the 9th of April, out at the house, when you say you four discussed this matter, I will ask you what, if anything, Clayton

(Testimony of Edward William Kelly.)

said to Bunny in that discussion about telling or not telling his wife about what you folks were going to do?

A. He mentioned to Bunny not to tell his wife, or if he told her she would tell Anderson and Albright, and we would all be in jail.

Q. Did he say it several times?

A. Yes, sir.

Q. Did Shirley say it to Bunny too?

A. Yes, sir. [99]

Q. Who are Anderson and Albright?

A. Two City Detectives.

Q. During the discussion of the plans out there that night, what can you tell us as to whether or not Clayton okehed or approved any proposals made by Shirley?

A. When we was disscussing this thing—

Mr. Smith: I think I shall object to that.

The Court: The objection is sustained.

Mr. Connelly: On the ground it is not proper redirect examination?

The Court: That would be a good ground, but I sustained it on the ground it calls for the conclusion of the witness. You asked if he okehed or approved it.

Mr. Connelly: May I ask it in another form?

The Court: Unless Mr. Smith wishes to object that it is *no* not proper redirect examination.

Mr. Smith: I do so object.

The Court: I will sustain that objection.

Mr. Connelly: You may cross examine.

(Testimony of Edward William Kelly.)

Re-Cross Examination

By Mr. Smith:

Q. This trip to Pasco was on April 15th?

A. I am pretty sure.

Q. Do you know what day of the week you left for Pasco? A. On Saturday. [100]

Q. And you stayed there until Monday?

A. Yes, sir.

Q. And you rode down in Clayton's car?

A. That is right.

Q. And somebody named Rita Taylor was in the car with you? A. Yes, sir.

Q. Did she return with you? A. Yes, sir.

Q. In addition to her a man named Sam Lavin returned? A. Yes, sir.

Q. Were you with Clayton at Pasco?

A. I was.

Q. What hotel did you stay at in Pasco?

A. The Pasco Inn.

Q. Did you register?

A. No, sir; he registered for me.

Q. Were you present when he registered for you? A. I was not.

Q. Do you know what name he put on the register? A. No, sir; I don't think I do.

Q. But you did stay at the Pasco Inn on the night of the 15th of April and the night of the 16th of April?

A. We stayed in Kennewick the first night.

Q. What hotel did you stay at there?

A. I don't recall the name of it. [101]

Q. Where is it located in Kennewick?

(Testimony of Edward William Kelly.)

A. I don't know. It was 1:00 o'clock in the morning, when we got in, and it was dark. I couldn't tell you where it was located.

Q. It was dark, and you don't know where it was located. Was it on the main street?

A. I think it was.

Q. How large a hotel was it?

A. About 30 or 40-room hotel, I would imagine.

Q. And who stayed there besides you?

A. Clayton and this woman.

Q. And the next night you stayed at the Pasco Inn? A. Yes, sir.

Q. In Pasco? A. Yes, sir.

Q. Did you register at the Pasco Inn?

A. I don't think I did. I think he registered for us.

Q. Clayton made both registrations?

A. I think he did.

Q. Were you out of the city of Spokane at any other time after April 10th? A. I was.

Q. Where did you go?

A. I left Spokane after I came back from Pasco with Clayton, and I went to Anaconda and Butte, Montana. [102]

Q. When did you go to Anaconda?

A. I think I left here on the 20th or 21st of April.

Q. How long did you stay in Anaconda?

A. I was there about a week.

Q. Did you go alone on that trip?

A. I did.

(Testimony of Edward William Kelly.)

Q. And you stayed over there one week?

A. About a week.

Q. What hotel were you in at Anaconda?

A. The Montana Hotel.

Q. What name were you registered under?

A. Under my own name.

Q. Your name of Edward Kelly?

A. Edward Kelly.

Q. And did you leave there and go to Butte?

A. Yes, sir.

Q. How long were you at Butte?

A. I was only in Butte a day and I came back here.

Q. Did you stay at a hotel in Butte?

A. No, sir. I was there only one day.

Q. You were in Anaconda from the 20th until near sometime around the 27th or 28th of the month? A. That is right.

Q. Then you came back to Spokane?

A. Yes, sir. [103]

Q. Did you make any other trip out of Spokane from April 10th on until the date of your arrest?

A. Yes, sir. I made several trips to Coeur d'Alene.

Q. You went up to Coeur d'Alene?

A. Yes, sir.

Q. On what dates were you in Coeur d'Alene?

A. I couldn't say as to the dates, but sometime in May.

Q. Was that the trip you are referring to when you went up to see Dr. Teed with Bunny Doores?

(Testimony of Edward William Kelly.)

A. Yes, sir.

Q. Is that the only trip you made to Coeur d'Alene?

A. Yes, sir; that is the only time I went up there that I recall.

Q. You said several trips?

A. I went up once with Shirley and once with Bunny.

Q. You went up with Shirley on the 10th of April? A. Yes, sir.

Q. And you went up with Bunny and yourself and then you went up with Shirley again?

A. Yes, sir.

Q. That was the day of your arrest by the sheriff at Coeur d'Alene? A. That is right.

Q. Were you any other place from the 10th of April to the date of your arrest outside the city of Spokane? A. Not that I know of. [104]

Q. Were you living at the Galax Hotel all that time? A. That is right.

Q. Where did you meet George Clayton down town on the 16th of May?

A. I don't exactly know what you mean.

Q. Where did you meet him on the 16th. You said you met him on the 16th of May, and he took you in his car.

Mr. Connelly: April.

Mr. Smith: I do not think I am mistaken on that.

Q. Did you not say you met him on the 16th of May? A. Yes, sir.

(Testimony of Edward William Kelly.)

Q. Where did you meet him?

A. Along the side of the Spokane Air Depot, or the depot across the street from the Chicago Hotel. I don't know one street from the other out here.

Q. The Spokane Air Depot?

A. I think that is what they call it. It is the building that sets there on the corner of Main Avenue and that cross street by the Chicago Hotel.

Q. And where did you drive to?

A. We didn't drive.

Q. What did you do?

A. Sat in the car and talked.

Q. You sat in his car and talked?

A. Yes, sir. [105]

Q. That is when he told you he knew Shirley did not get more than \$600?

A. That is right.

Q. Where was this statement made that nothing should be said to Bunny's wife about this matter, or she would tell Anderson and Albright?

A. Out at the house.

Q. When?

A. The time the plans were talked over the night of April 9th.

Mr. Smith: That is all.

Mr. Connelly: That is all.

(Witness excused)

Mr. Connelly: I want Mr. Kelly to remain in the court room while the next witness is called, who may or may not identify him, and I would like

to request that Shirley Doores come in the court room too. Is Stevenson there?

The Baliff: No.

Mr. Connelly: Then call Dr. Teed.

Mr. Smith: Are you going to recall Bunny Doores?

Mr. Connelly: No.

Mr. Smith: Go ahead. At some other stage I want to ask him some further questions.

Mr. Connelly: I will not call the witness I had in mind until Shirley is here. I will call Dr. Teed now. [106]

---

#### DR. E. H. TEED

called as a witness by the Plaintiff, first duly sworn, testified as follows:

##### Direct Examination

By Mr. Connelly:

Q. Please state your name.

A. E. H. Teed.

Q. You live at Coeur d'Alene, Idaho?

A. Yes, sir.

Q. What is your profession?

A. Physician and surgeon.

Q. How long have you practiced your profession, Doctor, at Coeur d'Alene?

A. Eighteen years.

Q. You are licensed under the laws of the State of Idaho to practice medicine and surgery?

A. Yes, sir.

(Testimony of Dr. E. H. Teed.)

Q. How long have you held such license?

A. Since 1919.

Q. I will ask you to state whether or not you are acquainted with Shirley Doores.

A. Yes, sir.

Q. Approximately when did you first meet her and where did the meeting take place?

A. I first met her about the last of December, 1943, in my office at Coeur d'Alene. [107]

Q. At that time did she use the name Shirley Doores to you? A. No, sir.

Q. What name did she use?

A. Velma Rock.

Q. If she stated the purpose of her visit to your office, tell us what she said.

A. She said that she had been injured in an automobile accident about a month or two before, and she had an injured spine and was using some morphine to relieve the pain, and wanted to know if I would give her a hypo.

Q. Did you do so? A. I did.

Q. How long after that was it before you next saw her?

A. About the first of Janpary, 1944.

Q. Do you mean on New Year's day or are you fixing a period?

A. The first or second of January.

Q. And what conversation did you have with her at that time?

A. She wanted me to give her a prescription for some morphine so she could get some tablets.

(Testimony of Dr. E. H. Teed.)

Q. Did you do so? A. I did.

Q. How long after that was it until you next saw her? A. I think about January 5th.

Q. And what was the conversation with her at that time?

A. She wanted another prescription for some morphine. [108]

Q. Did you give her one? A. I did.

Q. When was it that you next saw her?

A. I believe about the 12th of January.

Q. What did she say to you at that time?

A. She just wanted another prescription.

Q. Did you give her another prescription?

A. Yes.

Q. For what? A. For some morphine.

Q. Do you recall the quantity?

A. I think forty half grains; I am not sure.

Q. After that date, January 12th, do you recall when it was that she was next in your office?

A. Do you care if I refer to my notes?

Q. For the purpose of refreshing your recollection? A. Yes, sir; for the dates.

Mr. Connelly: May he refer to his notes?

The Court: You can look at your notes and refresh your recollection. You cannot testify from your notes, but by looking at them you can refresh your memory as to dates.

Q. When were those notes made?

A. They were made at the time of the last hearing.

(Testimony of Dr. E. H. Teed.)

The Court: The hearing before the Grand Jury?

A. No. At the time we were supposed to have the trial in October. [109]

The Court: You cannot use those. These are not original notes that he made at the time. If he had a prescription book here he could refer to that, but he cannot look at notes he made up. Just put those back in your pocket, Doctor.

Q. I now hand you plaintiff's Exhibits for identification 1 to 17, inclusive, and I direct your attention as to the dates, particularly the date of Plaintiff's identification No. 4, and I will ask you to examine them each, and to state what they are, and after you have stated that, to tell us whom you delivered them or handed them over to. Tell us what they are for after you have examined them.

A. They call for narcotics.

Q. What is the first date in the order of time?

A. The 30th of December, 1943.

Q. And that is identification 4, in the series which you hold in your hand? A. Yes, sir.

Q. What is the next date, going through them in order to No. 17—No. 16?

A. That is for narcotics.

Q. What is the date? A. April 8, 1944.

Q. You wrote the prescription? A. I did.

Q. With reference to identifications Nos. 1, 2, 3 and 4, whose name appears thereon as the patient?

[110]

A. Velma Rock.

(Testimony of Dr. E. H. Teed.)

Q. With reference to identifications 5 to 16, inclusive, whose name appears thereon as the patient?

A. Mike Sanders.

Q. With reference to Plaintiff's identification 17, whose name appears thereon?

A. H. L. Irvy.

Q. To whom did you deliver identifications 1 to 4, and 5 to 16, inclusive?

A. To the same person, Velma Rock.

Q. Do you mean Shirley Doores also?

A. Yes, sir.

Q. You have since learned her name is Shirley Doores? A. Yes, sir.

Q. What, if anything, did you do with plaintiff's identification 17? A. I gave it to Mr. Irvy.

Q. You did not give it to Velma Rock?

A. No, sir.

Mr. Connelly: I withdraw it for the time being.

Q. Will you state whether or not identifications 1 to 16 were given to Shirley Doores on the date which appears on each of the prescriptions?

A. Yes, sir.

Q. Where? [111]

A. The prescriptions were given in my office.

Q. In each instance? A. Yes, sir.

Q. Will you state the circumstances under which you gave Shirley Doores prescriptions written in the name of Mike Sanders, and how that came about?

A. She told me she had a sick friend named Mike Sanders who was not able to come to the office,

(Testimony of Dr. E. H. Teed.)

and asked if I would—he was a user of morphine—and asked if I would give her the prescription for Mike Sanders so she could take it to him.

Q. Do you know when that was?

A. The nearest I can remember it was about the 30th of January.

Q. Do any of the identifications here indicate the first prescription you made out in the name of Mike Sanders? A. Yes, sir; No. 5.

Q. No. 5? A. Yes, sir.

Q. And will you tell us what conversation, if any, you had with Shirley Doores with reference to the giving of the prescription to her, being written in the name of Mike Sanders?

A. Well, she claimed she had a friend named Mike Sanders and he sent her to get the prescription. [112]

Q. Are you speaking of an occasion after the first prescription you wrote for Mike Sanders?

A. After the first one or two she always asked to make them out for Mike Sanders.

Q. State whether or not any conversation was had between you and Shirley Doores about the amount of morphine you should prescribe in each prescription at any time?

A. After the first two or three she asked me to increase the amount.

Q. Was any reason stated by her or was it just a request? A. Just a request.

Q. And you did so? A. Yes.

(Testimony of Dr. E. H. Teed.)

**Q.** How long did you continue to give her the prescriptions in the name of Mike Sanders?

**A.** Up to about April 8th.

**Mr. Connelly:** I will offer plaintiff's identifications 1 to 16 in evidence.

**The Court:** By the 30th of January you knew that Shirley Doores was an addict?

**A.** Yes, sir; I was pretty sure of that.

**The Court:** Did she make any statement as to being sick after the first examination?

**A.** No, sir.

**The Court:** And you knew from that time on she was getting it for that use? [113]

**A.** Yes, sir. I knew that what she got for herself was, but I was under the impression what she was getting for Mike Sanders was for him.

**The Court:** But you said that she said Mike Sanders was a user too?

**A.** Yes, sir.

**The Court:** She did not say he was injured and needed it for a legitimate purpose?

**A.** The claim was that he had syphilitic ulcers and was not able to walk.

**Q.** (Mr. Connelly): Who made that claim?

**A.** Shirley Doores.

**Q.** When did she make that claim to you?

**A.** The first prescription I wrote for Mike was the first time she referred to it.

**Q.** That was the first time she referred to Mike Sanders?      **A.** Yes, sir.

(Testimony of Dr. E. H. Teed.)

Q. Or asked you to write a prescription for Mike Sanders? A. Yes, sir.

Q. Where did she say Mike Sanders lived?

A. She said he lived at Granite, Idaho.

The Court: Morphine is not a recognized medication for syphilitic ulcers, is it, Doctor?

A. Except for pain.

Mr. Glesson: There is no objection. [114]

The Court: Plaintiff's Exhibits 1 to 16 are admitted in evidence.

(Prescriptions marked for identification Plaintiff's Exhibits 1 to 16, inclusive, admitted in evidence.)

[Printer's Note]: Set out in full at pages 37-52 of original reporter's transcript.

Q. (Mr. Connelly): Directing your attention to the 9th of April, Doctor, will you state whether or not Shirley Doores was in your office on that day?

A. The 9th of April?

Q. Pardon me. The 10th of April.

A. Yes, sir. She came to my office on the 10th of April.

Q. What conversation did you have with her at that time?

A. She wanted a prescription for morphine, and I told her I could not give her any more.

Q. How long did she remain in your office at that time?

A. I imagine 15 or 20 or maybe 30 minutes.

(Testimony of Dr. E. H. Teed.)

Q. And as she was leaving will you state whether or not you met anyone else in your office?

A. As she got up to leave, somebody rapped on the door, and I opened the door, and this strange man came in.

Q. Have you seen that man here around court today? A. I saw him in the corridor.

Q. Today? A. Yes, sir.

Q. Do you know his name?

A. His name is Kelly. [115]

Q. Edward Kelly? A. Yes, sir.

Q. Now, will you tell the Court and jury what conversation took place when Mr. Kelly appeared at your office, when Shirley Doores and you were about to leave your private office?

A. When this man came in, the first thing he said was "Hello, Shirley. What are you doing here?" And he said "I am Mr. Graven, from the narcotics office at Seattle."

Q. And what did Shirley do?

A. Then Shirley introduced me to Mr. Graven as a narcotic agent from Seattle, and—

Q. How long did Shirley remain after that?

A. She started to leave after that, and this man told her not to leave, because he wanted to see her, but she left the office and went downstairs, and this Mr. Graven sat down and said he had a—had been talking to Mike Sanders and that Mike told him he had not been getting morphine from me, and that he had a warrant in his pocket for my arrest.

(Testimony of Dr. E. H. Teed.)

Q. What, if anything, was said about prescriptions in the name of Mike Sanders?

A. He said I had been issuing prescriptions to Mike Sanders.

Q. Did he say he had been talking with Mike Sanders? A. Yes, sir.

Q. What did he say that Mike Sanders had told him about [116] prescriptions for morphine?

A. He said that Mike told him he had not been getting any morphine.

Q. Had not been getting any? A. Yes, sir.

Q. What else, if anything, did he say about Mike Sanders, or whether Mike Sanders had ever been at your office?

A. And he said that Mike Sanders had never been to the office.

Q. Did he say that Mike Sanders said he never had been there, or that Mike Sanders never had been there—was he accusing Mike Sanders of not being there, to you?

A. He said that Mike Sanders told him he had not been to the office.

Q. What did you say to this man about these Mike Sanders prescriptions?

A. I told him I had written Mike Sanders prescriptions, but I was under the impression I was not violating any law in writing the prescriptions.

Q. What did this man who represented himself as Mr. Graven have with him, visible to you?

A. He had a briefcase with some papers in it.

Q. What, if anything, was said by you or by

(Testimony of Dr. E. H. Teed.)

him about any credentials, as a narcotics inspector?

A. He said he had his credentials in his pocket, and he fingered out some papers, but I didn't examine them. [117]

Q. Did he hand them to you? A. No, sir.

Q. What did this man pretending to be Mr. Graven tell you he was going to do about these Mike Sanders prescriptions?

A. He said he wouldn't serve the warrant at that time, but would wait until five o'clock until he had contacted the office in Seattle.

Q. And after that did he remain or leave?

A. He left shortly after that.

Q. Then who returned to your office following that?

A. Shirley Doores came back to the office then.

Q. Approximately how long after Kelly or Graven left was it that Shirley Doores returned?

A. About fifteen minutes.

Q. Will you tell what Shirley Doores had to say to you about this Mr. Graven or about his visiting your office?

A. She said she had met Graven down on the sidewalk and had had a talk with him, and she thought that Graven could be fixed, as he had picked her up one time for possession and she had fixed him for \$2,000.

Q. Did she say where that had taken place?

A. I believe in Seattle.

Q. What else did she say, if anything, and what did you say?

(Testimony of Dr. E. H. Teed.)

A. Then she asked me how much I would pay, and I told her I didn't know, but for her to find out from Graven how much [118] he wanted, and she left the office and returned a little later and said that Graven wanted \$2,500.

Q. What did you say or do about that?

A. I told her I didn't have the \$2,500, but I thought I could get it by one o'clock.

Q. Did you get it? A. Yes.

Q. Where and how did you get it?

A. I went to the bank and cashed a check.

Q. What kind of a check?

A. A cashier's check.

Q. Drawn on what bank?

A. The Spokane & Eastern.

Q. In what amount was the total of the check?

A. \$3,500.

Q. When had you secured that?

A. On April 7th.

Q. Had you secured any other cashier's check in Spokane on that date?

A. I had another check on the First Federal Loan.

Q. In what amount? A. \$3,500.

Q. What was your purpose in securing those cashier's checks on April 7th?

A. I was putting the money into a club. [119]

Q. Where? A. In Couer d'Alene.

Q. But by April 10th you had not used them?

A. No, sir. I had not used the money by April 10th.

(Testimony of Dr. E. H. Teed.)

Q. After you had cashed the check issued by the Spokane & Eastern Bank did you meet Shirley Doores, or not?

A. Yes. I met Shirley about one o'clock or a little after.

Q. And where did you meet her?

A. I met her on the corner of Couer d'Alene Avenue and Fourth Street, in Couer d'Alene.

Q. Was there any reason for meeting her there rather than at your office?

A. She suggested that it would be better if I met her some place instead of out at the office.

Q. Who suggested the place?

A. And I suggested some place around close there, and I thought Couer d'Alene Avenue and Fouth Street would be as good as any place.

Q. Did you walk over there?

A. I drove over.

Q. In your car? A. Yes, sir.

Q. Did you meet her there? A. Yes, sir.

Q. Did she get in the car? [120]

A. Yes, sir. She got in the car and we drove out Fouth Street to the road that leads to Spokane, and I gave her the \$2,500.

Q. In what form?

A. It was in rather large denominations.

Q. The largest the bank had?

A. It was fifties and twenties and possibly a few one-hundred dollar bills.

Q. You gave her \$2,500?

A. Yes, sir; on April 10th.

(Testimony of Dr. E. H. Teed.)

Q. Where did she leave your car?

A. About two miles on the Appleway toward Spokane.

Q. What, if anything, did she say about getting out there?

A. She said she wanted to get out there because she was going to get on the bus at that particular time to meet Graven who would be on the bus, and they were going to Spokane together.

Q. When was the next time you saw Shirley Doores? A. April 11th.

Q. The following day? A. Yes, sir.

Q. What was the conversation with her at that time?

A. She wanted \$1,500 more. She said that Graven had to pay off another narcotic agent, and the clerk that had made out the papers.

Q. How much did she say she had to pay each of them? [121]

A. She said she had to pay the narcotic agent \$1,000 and the clerk \$500, so they would keep still.

Q. And what, if anything, was said in that conversation, as you recall, concerning narcotics or morphine?

A. She wanted—she said Graven wanted 100 grains of—100 tablets of morphine, and fifty grains of Codein and 100 tablets of dilaudid.

Q. What did you do with reference to these requests of Shirley Doores for the \$1,500 and these narcotics?

A. I gave her the money and the narcotics.

(Testimony of Dr. E. H. Teed.)

Q. You gave her \$1,500? A. Yes, sir.

Q. And the narcotics? A. Yes, sir.

Q. In the quantities you have indicated?

A. Yes, sir.

Q. One hundred tablets of morphine and 50 grains of codein and 100 tablets of dilaudid?

A. Yes, sir.

The Court: What papers were you talking about when he said the clerk wanted \$500?

A. I understood it to mean the papers that the clerk had drawn up for my arrest.

The Court: What clerk was it?

A. Some clerk connected with the Narcotics Bureau. [122]

Q. (Mr. Connelly): She was talking about the clerk in the Seattle office? A. Yes, sir.

Q. When did you next see Shirley Doores?

A. On April 12th.

Q. And where did you see her?

A. She came to the office.

Q. And what was your conversation with her?

A. She said that she had to have \$3,500 more to pay off some of the narcotic agents that were probably making this territory.

Q. Who were doing what?

A. Some of the narcotic agents that made this territory.

Q. And what did you do about that?

A. Well, I went to the bank and got \$3,500 and gave it to her.

Q. In what form did you get it?

(Testimony of Dr. E. H. Teed.)

A. I had a check on the First Federal Loan and I got it cashed at the bank in Couer d'Alene in the largest denominations that they had, in fifties and twenties mostly, I think.

Q. You gave those to Shirley Doores?

A. Yes, sir.

Q. Why were you giving her all of this money?

A. Well, it was hush money.

Q. What, if anything, did the possibility of your being [123] arrested and prosecuted have to do with your giving her this money?

A. That was why I gave it to her in the first place, to keep from being prosecuted.

Q. Will you state whether or not you believed she was turning it over to the various narcotic agents of the Treasury Department?

A. Yes, sir; I thought she was.

Q. Now, following this transaction of April 12th, will you tell us what, if any, suggestion Shirley Doores made to you about going away?

A. After I gave her the money she said that Graven thought I ought to leave town for a few days until this kind of blew over.

Q. And what did you say in respect to that?

A. I told her I thought I could leave, and then she wanted to know where I thought I would go, and I told her I thought I would go to Haley, Idaho, and she said she wanted to know where I was going so if something came up she could contact me.

Q. Did you tell her where you would be?

A. I told her to address me General Delivery, Haley, Idaho.

(Testimony of Dr. E. H. Teed.)

Q. Did you go to Hailey, Idaho?

A. Yes, sir. I left April 12th and I went to Hailey, Idaho.

Q. And after you were there did you receive any communication? [124]

A. On April 20th I went to Haley and asked if I had any mail.

Q. Where did you go?

A. To the postoffice. And the clerk gave me a telegram.

Q. I hand you plaintiff's Identification 18, and ask you to tell us whether or not that is the telegram which was delivered to you at Haley on April 20th? A. That is the telegram I received.

Q. Did you put any mark of your own in your own handwriting on the reverse side of that?

A. Yes, sir.

Q. What did you write on it?

A. I put the address she gave me over the 'phone of residence here in Spokane.

Mr. Connelly: I offer this Plaintiff's Identification in evidence.

Mr. Gleeson: We object to it as not being sufficiently identified.

The Court: I will sustain the objection at the present time.

Q. (Mr. Connelly): After you received the telegram at the postoffice at Haley, what did you do?

A. Well, the telegram asked me to call a certain number, one-six—

Q. You cannot go into that now. Tell us what number you called.

(Testimony of Dr. E. H. Teed.)

A. I called 1635 Walnut.

Q. Where? A. Spokane [125]

Q. Whom did you ask for?

A. I asked for Shirley Doores, or Shirley Clayton.

Q. What is that? A. Shirley Clayton.

Q. Do you know who answered the telephone?

A. No, sir. Some woman answered the telephone and I asked her for Mrs. Clayton, and she said that she would call her.

Q. Did Shirley Doores come to the telephone later?

A. She afterwards did; shortly afterwards she came to the 'phone.

Q. What did she say to you over the telephone?

A. She told me to get back to Spokane as fast as I could and get things straightened up by Saturday, as things were going bad, and if I did not get back there and get things straightened up before Saturday I would be picked up.

The Court: You say Saturday. What day was this?

A. That would be the 22nd of April.

The Court: I mean what day of the week. Was it Thursday or Friday, or what day did you talk with her?

A. That was Thursday, the 20th.

Q. (Mr. Connelly): And what did you do after she told you that over the long-distance telephone?

A. I immediately started for Spokane.

Q. Do you know about what time you got to Spokane?

(Testimony of Dr. E. H. Teed.)

A. I got into Spokane about midnight the 21st of April. [126]

Q. In your conversation with Shirley Doores was any address given to you by Shirley Doores as to where she could contact you?

A. Yes, sir.

Q. What was that address?

A. It was 7225 East Carlisle.

Q. I believe you said you wrote that down at that time?

A. Yes, sir. I wrote it on the back of the telegram.

Q. Did you endeavor to locate that address when you got to Spokane? A. Yes, sir.

Q. Did you find it that evening?

A. No, sir. I couldn't find it that evening.

Q. Where did you stay that evening?

A. I stayed at the Pedicord Hotel.

Q. Then on the following day can you tell us whether or not you located Shirley Doores?

A. The following morning I located the address and drove out there and called at the house and saw Shirley.

Q. Was that the address she had given you over the telephone? A. Yes, sir.

Q. And did you talk with her either there or anywhere in the neighborhood?

A. She got in the car and we went to some sandwich stand in the neighborhood there and had a cup of coffee. [127]

Q. And while you were there did you have any

(Testimony of Dr. E. H. Teed.)

conversation with her about this transaction or more money or narcotics or your arrest?

A. While we were there she went to a telephone booth and called Seattle.

Q. Before she went to place the telephone call what did she say she was going to do or whom she was going to contact?

A. She said she was going to contact Graven.

Q. Where? A. In Seattle.

Q. By 'phone? A. Yes, sir.

Q. Did she go to a 'phone booth?

A. She went to a 'phone booth and made a call and after a little bit she came back and said she had contacted Graven.

Q. Did you hear what she said over the telephone? A. I did not.

Q. What further did she report to you or say to you at that time after the 'phone call, what did she say that Graven had said?

A. That he had to have \$6,500 more.

Q. What did she say it was for?

A. To hush the narcotic agent in Seattle by the name of Bangs.

Q. Bangs, the Chief Inspector?

A. Yes, sir. [128]

Q. She used Br. Bangs' name?

A. Yes, sir.

Q. And when did she say Graven had to have that money in Seattle?

A. Graven told he she had to have the money in Seattle by nine o'clock Sunday morning.

(Testimony of Dr. E. H. Teed.)

Q. What did you tell her?

A. I told her I didn't have \$6,500.

Q. What else did you tell her?

A. But I might be able to get it if I could get to the bank.

Q. And then what did you do about getting any money?

A. I called up Couer d'Alene and asked the office girl if she would bring me over \$3,000.

Q. Who was your office girl?

A. Edna Cook.

Q. What, if anything, was said about a delivery of narcotics with this money being required?

A. She said that Graven wanted several hundred grains of morphine, at least 1,000 quarters and some halves.

Q. Half grain tablets of morphine?

A. Yes, sir.

Q. What did you do about that?

A. Well, after I had given her the \$3,000 which the girl brought from Couer d'Alene, why—and she was going to take that to Seattle.

Q. Who was? [129]

A. Shirley. And then I went to Couer d'Alene and got my narcotics blanks—

Q. Your order forms? A. Yes, sir.

Q. By which you purchased narcotics?

A. Yes. And that was on Sunday night, I think, I went after it.

Q. When did you return to Spokane?

A. I returned sometime after nine or ten o'clock after I had been to Couer d'Alene.

(Testimony of Dr. E. H. Teed.)

Q. Now, did you meet Shirley Doores any place on Sunday? A. Yes.

Q. Did you give her any money on Sunday?

A. No.

Q. On Saturday did you give her any money?

A. On Saturday I gave her the \$3,000.

Q. What, if any, arrangements were made about getting the balance of the money to Seattle?

A. The other \$3,500 I did not have; I couldn't get in the bank on Saturday afternoon, and she asked me to wire it to her by Western Union at Seattle.

Q. Wire the money by Western Union?

A. Yes, sir.

Q. To whom? A. To Shirley Doores.

Q. Did you do that? [130] A. No.

Q. When did you next see Shirley Doores after she left presumably for Seattle?

A. Sunday evening she called up the hotel and told me she had gotten back from Seattle, and she would come over to the hotel and tell me what happened in Seattle.

Q. Did she do that? A. Yes, sir.

Q. At your room at the Pedicord Hotel?

A. Yes, sir.

Q. What did she tell you had happened in Seattle?

A. That she had seen Graven and he had told her not to wire any money to Seattle, but to bring it over there and have it there by closing time by Monday.

(Testimony of Dr. E. H. Teed.)

Q. Who was to bring it? A. She was.

Q. What about the narcotics?

A. She was to bring the narcotics.

Q. What did you do after that?

A. Sunday evening?

Q. Yes.

A. That was when I went to Couer d'Alene and got the narcotic order form.

Q. The order form? A. Yes, sir. [131]

Q. What did you do Monday morning with the order form?

A. I filled it out and went to McKesson & Robbins and bought 1,000 quarter-grain tablets and 1,000 half-grain tablets.

Q. Of morphine? A. Yes, sir.

Q. And what, if anything, did you do about getting money for Mr. Bangs that morning?

A. Miss Cook came over to the bank and we got something over \$1,600 from the First Federal & Loan, in the form of a check, and I cashed that at the First National Bank, and then she went to the Spokane & Eastern and drew out \$1,500 there in cash.

Q. Whose money was this in the First Federal and the Spokane & Eastern? A. It was mine.

Q. In whose name were the accounts carried?

A. Edna Cook and Georgie Cook.

Q. Had you given Miss Cook and her mother the money to put in these accounts? A. Yes, sir.

Q. For what purpose? A. Safekeeping.

(Testimony of Dr. E. H. Teed.)

Q. Did you get any other money from Miss Cook which was not your money? [132]

A. Yes, sir. I borrowed \$500.

Q. From Miss Cook? A. Yes, sir.

Q. What did you do with the \$3,500 that day?

A. I took it and gave it to Shirley Doores.

Q. Where did you give her the money?

A. In my room at the Pedicord Hotel.

Q. Do you recall the number of that room?

A. It was 214.

Q. What time of day was that on that Monday?

A. That must have been around eleven o'clock.

Q. In the forenoon or evening?

A. The forenoon.

Q. And what did you do after that?

A. Well, she said that Graven thought It would be advisable if I left town for a few days again, and I left town and returned to Haley, and didn't get back to Couer d'Alene until May 7th.

Q. You left Spokane on the 24th of April and went to Haley, Idaho, and did not come back to Couer d'Alene until the 7th of May?

A. The 7th of May.

Q. When did you next see Graven, Kelly or Shirley Doores?

A. I didn't see any of them until May 16th.

Q. What happened then? [133]

A. Graven came in the office and asked me for \$250, saying he had paid that amount out of his own pocket to two narcotic agents to keep them off of my trail.

(Testimony of Dr. E. H. Teed.)

Q. What did you do about that?

A. And he also asked me for 100 tablets of morphine, saying that he had a man in jail that he wanted to give a few tablets to.

Q. For what purpose?

A. He said if he would give this man a few tablets he could get some more information about Shirley.

Q. What did you do about that? Did you give him the money?

A. I gave him \$125 in the office that morning, and I told him I couldn't get the other until after dinner, and he said he was in a hurry to get back to Spokane, and wanted to know if I would bring the other \$125 to Spokane to him, which I did in the afternoon, and I met him at the Union depot and gave him \$125 and the 100 tablets of morphine, and then he said I had put him to a lot of trouble, and he ought to have twenty dollars for the trouble I had put him to, and I gave him twenty dollars for that.

Q. Did you see him after that?

A. I didn't see him then after that until the 25th of May.

Q. Where did you see him then?

A. They came to my office.

Q. Who? [134] A. Shirley.

Q. Shirley Doores alone?

A. Yes, sir. She came alone first.

Q. How long was she there?

A. She was there probably thirty minutes.

(Testimony of Dr. E. H. Teed.)

Q. What did she talk about while she was there?

A. Oh, she told me if I would cooperate with her she would get me out of all the trouble.

Q. Do you recall anything else she said?

A. She said that Graven was in town and he wanted to see me and she would go down the street and find Graven.

Q. By that time did you know that you had been robbed? A. Yes, sir.

Q. And when she left the office to get Graven to come to your office what did you do?

A. I called the Sheriff in Coeur d'Alene and told him they were in town and they would be in my office.

Q. How long before that day had you learned you had been victimized? A. The day before.

Q. And that was from two Spokane police officers? A. And the Sheriff.

Q. The Sheriff of Coeur d'Alene?

A. Yes, sir.

Q. And when Shirley left, you 'phoned the sheriff? [135] A. Yes, sir.

Q. What did you tell him?

A. I told him Shirley was there in the office.

Q. What did he do?

A. And about probably five minutes later he was over there at the office.

Q. Were they arrested?

A. Yes, sir. They were arrested there in the office.

Q. Shirley Doores and Edward Kelly?

(Testimony of Dr. E. H. Teed.)

A. Yes, sir.

Q. Have you totaled the amount of money you paid over to this woman?

A. It totals up to \$14,270.

Q. In what denominations was the greater portion of this money?

A. The biggest portion of it was in \$100 bills, fifty dollar bills and twenty dollar bills.

Q. Directing your attention to that first day that Kelly used the name of Graven and was at your office, and after he left and Shirley was telling you how she could fix him, do you recall Shirley endeavored to telephone Mike Sanders?

A. She called Spokane and got ahold of Mike Sanders.

Q. Do you know what effort she made to call?

A. She called two or three different places in Spokane before [136] she could get ahold of him.

Q. Then what part of the conversation did you hear? Tell the Court and jury about that.

A. She told this Mike Sanders that he should not have denied that he got the morphine and he should have told them he got the morphine, and that would have cleared everything.

Q. Could you hear anything the other voice said over the 'phone?

A. And this man spoke quite loudly and I could hear a good share of it, and he said and told her not to bother him; that he didn't want her to bring him in it; that he didn't have any morphine, and that he wouldn't have anything, any part of it.

(Testimony of Dr. E. H. Teed.)

Q. What, if anything, did Shirley Doores relate, or did you hear, as to whether or not this purported Mike Sanders had talked with Graven?

A. Well, I can't just remember what she did say about that now.

Q. But do you recall the 'phone call on that day from Shirley Doores to Mike Sanders?

A. Distinctly, yes, sir.

Q. These narcotics you got from the McKesson Company on the 24th you did what with that?

A. I gave it to Shirley and the bottle that contained the 1,000 quarter grains of morphine, and I gave her 400 tablets out of a bottle that contained the half.

Q. And you retained the rest? [137]

A. Yes, sir.

Mr. Connelly: You may cross-examine.

The Court: Do you offer the telegram now?

Mr. Connelly: Yes, I was going to offer it.

The Court: It may be admitted.

(Telegram admitted in evidence as plaintiff's exhibit 18.)

[Printer's Note]: Set out in full at page 18 of original reporter's transcript.

#### Cross Examination

By Mr. Gleeson:

Q. I take it, Doctor, that the first time you saw Shirley Doores was the date of the first prescription here, December 30th?

A. No. I saw he once before that.

(Testimony of Dr. E. H. Teed.)

Q. How long before?

A. I think about the day before. I just gave her the hypo the first time she came in.

Q. You think that was the day before?

A. I think so. It might have been the previous day, but I think the day before.

Q. In any event, whenever it was you gave her this hypo was the first time you ever saw her?

A. Yes, sir.

Q. And as far as you knew at that time then she was entitled to it? [138]

A. I figured that she was, yes, sir.

Q. And did you ask her who had treated her for her spinal injury? A. Yes, sir.

Q. Did she tell you?

A. She told me some doctor in Okanogan had taken care of her when she had the accident.

Q. Did you ask her why she didn't go to any doctor in Spokane?

A. No. She said the accident happened up there in that vicinity, and—

Q. The vicinity of Okanogan?

A. Yes, sir.

Q. I note you have her address as Pacific Hotel, Spokane.

A. Yes, sir. That is the address she gave me.

Q. You understood that to be her residence?

A. Yes, sir.

Q. Understanding that to be her residence, did you ask her why she did not go to some doctor in Spokane?

(Testimony of Dr. E. H. Teed.)

A. I don't know whether I did or not. I probably did.

Q. That would be a natural inquiry?

A. Yes, sir.

Q. And you don't recall whether you asked her that or not? A. No, sir.

Q. That was the time you gave her the hypo—at the time you [139] gave her the prescription a day or so later, December 30th, did she tell you she had come up from Spokane then?

A. She didn't say where she came from.

Q. Did you ask her whether she stayed at Coeur d'Alene?

A. Yes, sir. I asked her if she stayed at Coeur d'Alene and she said no; she had a room at the Pacific Hotel for quite a while, she said.

Q. Did you ask her how she happened to be in Coeur d'Alene? A. No.

Q. Or whether she came there particularly to get this prescription from you?

A. I didn't ask her.

Q. Did you on that occasion ask her why she had not obtained the prescription from a doctor in Spokane? A. No.

Q. Did you know at that time she was a narcotic user?

A. I wasn't sure. She said this doctor in Okanogan had been giving her morphine off and on for pain caused by the injury, and he was out of town, and she couldn't contact him.

Q. Okanogan is quite a distance from Spokane, you knew that?

(Testimony of Dr. E. H. Teed.)

A. I didn't know just where Okanogan was.

Q. Living in Spokane you at least knew that Coeur d'Alene was in the opposite direction, and that there were plenty of physicians in Spokane?

A. Yes, sir. [140]

Q. Who would treat one with a legitimate injury? A. Yes, sir.

Q. Did you make any examination of her person? A. I did.

Q. To what extent?

A. To see if I could find any evidence of injury.

Q. Did you make an examination of her person to determine whether or not you could find evidence that indicated whether or not she was a user of narcotics? A. I didn't notice any.

Q. Did you look for them?

A. Not particularly.

Q. Now for an injury to the back, a spinal injury such as she had, under ordinary circumstances what would your prescription be?

A. Ordinarily if there was no pain, probably a local application would be prescribed.

Q. A local application of what?

A. Heat or massage or probably some kind of an ointment.

Q. Did you prescribe anything like that?

A. I told her to apply heat to it.

Q. When did you do that?

A. The first time I examined her.

Q. That was when you gave her the hypodermic?

A. Yes, sir. [141]

(Testimony of Dr. E. H. Teed.)

Q. Did you make any subsequent examination?

A. No, sir.

Q. In your examination to determine whether or not she had suffered a spinal injury, did you reach any determination?

A. The only evidence I could find was considerable pain on motion and pressure.

Q. In what part of the spine?

A. That is in what we call the lumbar region.

Q. And what part of the spine is that, generally?

A. Below the ribs and above the pelvis.

Q. For pain of that sort you ordinarily prescribed quarter grains or half grains?

A. It depended on the amount of pain.

Q. You cannot determine that except from what the patient tells you? A. That is correct.

Q. And from these first couple of experiences—of course, you had only her word for it?

A. Yes, sir.

Q. And you did prescribe them in your first prescription, Exhibit 4. Will you tell me how much that is? A. Twenty.

Q. Twenty tablets to be taken when?

A. As often as required for pain.

Q. How long should that last under ordinary circumstances? [142]

A. Oh, it might last two or three days and it might last a week.

The Court: You mean the twenty tablets?

A. Yes, sir. That would depend on the amount of pain a person has.

(Testimony of Dr. E. H. Teed.)

Q. (Mr. Gleeson): In anyevent, there were twenty tablets on the first one and that you understand would last from two days to a week?

A. It is had to tell.

Q. Is that true of a person who was not a user of narcotics? A. Yes, sir.

Q. How long prior to that time did she claim to have had the injury?

A. One or two months, I don't remember which; but it had been quite a while.

Q. Did she tell you how much she had been using during that period to alleviate the pain?

A. I don't recall that she did. When I gave her the hypo she signified that would be enough to relieve her for the time being.

Q. In any event, on that date you were not suspicious? A. No, sir.

Q. And she came back two days later on January 1st. This first one was half grains?

A. Yes, sir. [143]

Q. And then the next time those are half grains again? A. Yes, sir.

Q. How many tablets? A. Forty.

Q. At that time when you gave her the half-grain tablets did you ask her if she had sought any treatment in Spokane? A. No, sir.

Q. At that time was there any suspicion in your mind that she might or might not be a user?

A. I figured at that time she was getting used to morphine.

Q. Getting used to it by reason of her injuries?

(Testimony of Dr. E. H. Teed.)

A. No—well, the length of time she had been using it dating from the injury, being a month or two months, she was getting used to morphine.

Q. When you administered the hypodermic did you make her the usual office charge?

A. Yes, sir.

Q. What was that?

A. Two dollars and fifty cents.

Q. And on your second charge, on January 1st, what was the charge at that time?

A. Two dollars and fifty cents.

Q. And what— A. Each was \$2.50.

Q. Each prescription? [144] A. Yes, sir.

Q. You never made any variation in the charge at all? A. No, sir.

Q. Did you sell her any narcotics directly?

A. No, sir.

Q. Did you deliver her any narcotics directly?

A. Yes, sir.

Q. Other than those referred to in these prescriptions? A. No, sir.

Q. When you delivered them to her personally how did you do that?

A. I wrote the prescription and gave it to her and she gave me back the prescription and asked if I would go to the drugstore and get it filled.

The Court: When was that?

A. That started about the time I began writing for Mike Sanders, around the 24th or 30th of January.

(Testimony of Dr. E. H. Teed.)

The Court: Were not all the prescriptions after you started writing for Mike Sanders, in the name of Mike Sanders—there were no Shirley Doores prescriptions after that time?

Mr. Connelly: No.

Mr. Gleeson: After he started with Mike Sanders that is the way they were all written. [145]

Q. (Mr. Gleeson): In any event, on the 24th when you started to write for Mike Sanders, you never gave Shirley Doores or Velma Rock any further prescriptions for herself? A. No, sir.

Q. You knew that she was requiring it for her injury?

A. Up to that time she was supposed to.

Q. At that time did you reach a determination that she was a user?

A. Yes, sir. I was pretty sure she had formed the habit.

Q. And you knew these prescriptions were for her?

A. No, sir. I was under the impression they were for this man she was telling me about.

Q. Did she ask for any narcotics for herself?

A. No, sir.

Q. Did you make any inquiry where she was getting her narcotics to treat her injury?

The Court: By that time he knew there was not an injury.

Mr. Gleason: He said he began to be suspicious.

A. The only inkling I had that Mike could not have been getting all of them was, I told her I

(Testimony of Dr. E. H. Teed.)

thought Mike was using quite a lot, and she said "Well, he gives me a few once in a while."

Q. (Mr. Gleeson): Up to the time you stopped writing for her she had sixty half-grain tablets in about a month? [146] A. Yes, sir.

Q. And after you refused to give her any more of them in April, on April 8th, was the last one, as far as you knew then the only morphine she was getting was whatever little Mike Sanders permitted her to have? A. Yes, sir.

Q. Did you make any investigation as to whether or not her name was Velma Rock?

A. No, I didn't.

Q. Did you require any identification from her?

A. She showed me her billfold with the name Velma Rock in it.

Q. When was that?

A. When she first came.

Q. When did you first learn her name was not Velma Rock?

A. Oh, I don't remember just when that was, but it kind of seemed to me it was around the first of March.

Q. How did you happen to find that out?

A. She wrote something on a paper or an envelope and I saw she had Shirley Clayton on it, and I asked if she was going by more than one name, and she said yes, that she went by the name of Shirley Clayton.

Q. Now you say, I take it, that these prescriptions you made out in the name of Mike Sanders

(Testimony of Dr. E. H. Teed.)

you delivered to her, on at least part of them she returned them to you [147] and you took them down to the drugstore and had the prescription filled?

A. Yes, sir.

Q. When you do that you have to sign for them at the drugstore? A. Yes, sir.

Q. Whose name did you sign?

A. My own.

Q. Did you at any time sign Mike Sanders by yourself, or Mike Sanders individually, or any other name? A. No.

Q. On the occasions when you did that, what charge did you make in addition to the \$2.50 for the prescription?

A. Just what the druggist charged for the morphine.

Q. Have you any way of determining from these prescriptions we have before us which of those you had filled yourself?

A. They should have my name on the back.

(Short recess.)

Q. (Mr. Gleeson): Now, Doctor, did you have an opportunity to segregate those during recess?

A. Yes.

Q. The exhibits 13, 12, 10, 9, 8 and 7, then, are ones that you yourself took to the drugstore and had filled? A. Yes.

The Court: Is that right? [148]

A. Yes.

The Court: That is six of them.

(Testimony of Dr. E. H. Teed.)

Q. (Mr. Gleeson): Now, Doctor, what was the reason for that—I mean, for your taking them down yourself rather than having Shirley take them down?

A. She was afraid if she took them down they wouldn't fill them.

Q. Did she tell you why?

A. No. I suppose because they had refused her.

Q. Had they refused her?

A. I don't know.

Q. Had she reported to you that they had refused her? A. No, sir.

Q. There are two drugstores. The first time—you took them all to Hart's Drugstore. Was there any reason for that, any particular reason?

A. No, sir; I just happened to, I guess.

Q. Which is closer to your place of business?

A. I think there is only ten feet difference.

Q. In any event, are you able to tell now from these six prescriptions you had filled yourself what charge you made her for those narcotics?

A. No, sir; I don't remember, but I think it was in the neighborhood of about six cents a tablet.

Q. Is that the average going price? [149]

A. I don't know.

Q. Was it at that time? A. I don't know.

Q. How did you arrive at six cents?

A. I didn't. That was the druggist's charge.

Q. That was the druggist's charge less your discount? A. I didn't get a discount.

(Testimony of Dr. E. H. Teed.)

Q. As an accomodation to Shirley you got the prescriptions filled and brought them back and she paid you a certain price the druggist charged you, plus \$2.50 for the prescription?

A. Yes, sir; exactly.

Q. Do these prescriptions indicate on the face how many tablets they call for?

A. Yes, sir.

Q. Where is that indicated?

A. Right here (indicating).

Q. The L-50? A. Yes, sir.

Q. Tell us what they are?

A. In writing prescriptions we use the Roman numerals and I means one and II means two and III means three and IV means four and X means ten and XX means twenty, and XL is forty and L is fifty, C is 100 and D is 500. Do you wish me to read it? [150]

Q. If you will give us the items we can do our own addition.

A. One for 50, another for 50, another for 100, another for 100 and another for 80.

Q. Those are half or quarter grains?

A. The first two are for half grains, 50 tablets each, and the other one is 100 quarter grains, and the next is quarter grains, 100 tablets, and the next was quarter grains, 80 tablets, and the other is 1/20 grains dilaudid, and the next is 50 tablets half-grain, and the next is 40 tablets half-grain, and the next is 200 tablets one-quarter grains, and the next is 200 tablets one-quarter grains, and the next is

(Testimony of Dr. E. H. Teed.)

one-sixteenth grains dilaudid, 100 tablets of dilaudid, one-twentieth, and the next is 100 tablets one-sixteenth grain dilaudid, and the next is 60 tablets half-grain, and the next is 50 tablets half-grain.

Q. Is "dilaudid" the word you used there?

A. Yes, sir; dilaudid.

Q. What was the reason for the varying in the prescriptions, when they are not the same?

A. Dilaudid is a different preparation from morphine, but it is a narcotic.

Q. Was there any particular reason for changing from the regular half and quarter grain tablets of morphine to this dilaudid? [151]

A. I think the only reason was that she asked for dilaudid instead of morphine.

Q. You mean Shirley did? A. Yes, sir.

Q. You never saw Mike Sanders?

A. No, sir.

Q. Or made any investigation to determine where he lived? A. No, sir.

Q. Did you see or did anyone present to you any instrument or any diagnosis or anything to show that he had a case of syphilitic ulcers?

A. I just took Shirley's word for it.

Q. That was at a time that you had reached the conclusion she was probably a narcotic addict?

A. Yes, sir.

Q. Now, did you request Shirley to furnish you with any specific information with regards to this Mike Sanders? A. No, sir.

(Testimony of Dr. E. H. Teed.)

The Court: Do you want my totals? 300 half-grains, 500 one-quarter grains, 100 one-twentieth dilaudid, and 200 one-sixteenth dilaudid.

Q. (Mr. Gleeson): Would that be a considerable amount for the period covered for a man with these ulcers that she claimed that he had?

A. It is a pretty good amount, but I wouldn't say it was [152] excessive.

Q. During that entire period of time up to the 4th or 8th, whenever it was that you quit prescribing, did Shirley request any prescription from you for herself? A. No, sir.

Q. Did you furnish her any prescriptions for herself? A. No, sir.

Q. Did you administer any hypodermic treatment to her during that period other than the first one? A. Yes, sir.

Q. On how many occasions?

A. Two, I think.

Q. When were those?

A. I don't remember when those were.

Q. When to your best recollection?

A. They were I think in January. They were not for morphine.

Q. What were they?

A. They were bismuth.

Mr. Connelly: I move to strike that as immaterial. Bismuth is not a narcotic.

The Court: I will deny the motion.

Mr. Connelly: May it be understood that bismuth is not a narcotic?

(Testimony of Dr. E. H. Teed.)

Q. (Mr. Gleeson): Is it? A. No, sir.

[153]

Q. What did you administer it for?

A. It is one of the treatments to give folks for syphilis.

Q. Had you prescribed it for Mike Sanders?

A. No, sir.

Q. Had you prescribed anything for Mike Sanders other than these narcotics? A. No, sir.

Q. Did you make any inquiry from Shirley Doores as to why this man Sanders was not getting his prescriptions from his own local doctor?

A. Yes.

Q. What did she tell you?

A. She told me he had been getting it at Sandpoint and the doctor up there had got peeved at him and wouldn't give him any more.

Q. Did she tell you who the doctor was?

A. I don't think she did.

Q. Did you ask her?

A. I don't think so.

Q. Did you make any inquiry of your own?

A. No, sir.

Q. Where is Granite, Idaho?

A. About half way between Sandpoint and Coeur d'Alene on the main highway and about six miles north of Farragut.

Q. Did you have any patients of your own in that vicinity? [154]

A. Not at that time.

(Testimony of Dr. E. H. Teed.)

Q. In any event, you made no independent investigation of any kind to determine anything about Mike Sanders? A. No, sir.

Q. I believe you testified you did give Kelly 100 tablets of half-grain morphine?

A. You mean personally to Kelly?

Q. That is what I understood.

A. I think those were quarter grain. That is on the date that he came to Coeur d'Alene and wanted \$250.

The Court: On May 16th?

A. Yes, sir.

Q. (Mr. Gleeson): Did you ever at any other time give him any narcotics? A. No, sir.

Q. Did you ever at any time give him a prescription for narcotics? A. No, sir.

Q. Or administer any hypodermic to him?

A. No, sir.

Q. Did you ever at any time give Wesley Doores any prescription for narcotics? A. No.

Q. You know him? A. I do now. [155]

Q. When did you first meet him?

A. I met him sometime between the 16th of May and the 25th of May. I don't recall what day.

Q. At that time did you give him any narcotics?

A. Well, yes and no.

Q. Please explain your answer.

A. He brought a letter supposed to be from Graven, asking me to give him a hypo.

Q. Did you keep the letter?

A. I think I turned it over to the court.

(Testimony of Dr. E. H. Teed.)

Q. Is that the only time?

A. Well, I gave him a half-grain tablet and he took the hypo himself.

The Court: There in your office?

A. Yes, sir.

Q. (Mr. Gleeson): Is that the ordinary or usual dose?

A. It is I think what you would call the average dose.

Q. Was there any reason given by him or in the letter as to why he needed it?

A. I don't remember what the letter said any more except that it just asked me if I would give him a hypo.

Q. What kind of a letterhead was it written on?

A. I don't think it had any letterhead.

Q. Was it written in pencil or ink?

A. I think ink. [156]

The Court: You said the average dose—

A. For a person in pain.

The Court: When you go to the hospital to perform an operation and a hypodermic injection is given preceding the operation, how large a dose is that?

A. It depends upon the person and the age of the person and how long the operation is going to last. It runs all the way from one-eighth or one-sixteenth to a quarter or a half. Seldom more than a half grain.

Q. (Mr. Gleeson): Under those circumstances you say it depends on the age whether you give a

(Testimony of Dr. E. H. Teed.)

quarter or a half grain or some variation in between, and that is not administered more than about how many times a day?

A. Before an operation usually one, and they usually put in a little stripine with it.

Q. But there is a maximum, is there not, of the amount of narcotics that the doctor would give to one who is not an addict without some bad effect?

A. That depends considerably on how much his pain is. If you are having a lot of pain you can stand more morphine than if you are just administered it for sedative purposes.

Q. But we were talking about a person who had been injured a month or two before and the pain was more or less a permanent thing.

A. The more they take the more they have to have to get relief. [157]

Q. But they progressively require more and more until they finally become an addict?

A. Yes, sir. And a person that is an addict will use as high as ten or twelve or fifteen grains a day.

Q. I will offer you Exhibit—Defendant's Exhibit "A", for identification, and ask you if that is the note you refer to?

A. Yes, sir; that is the one I referred to.

Q. As coming from—the authority under which you gave the narcotic to Wesley Doores?

A. Yes, sir. That was supposed to be from the Narcotic Agent.

Mr. Gleeson: We offer Defendant's Exhibit for identification "A" in evidence.

(Testimony of Dr. E. H. Teed.)

Mr. Connelly: No objection.

The Court: It may be admitted.

(Letter admitted in evidence as Defendant's Exhibit "A".)

[Printer's Note]: Set out in full at page 81  
of original reporter's transcript.

Mr. Gleeson: I would like to read it to the jury.  
(reading exhibit "A" to the jury)

Q. Had you had some previous conversation  
with Mr. Graven or Mr. Kelly about a Mr. Emory?

A. No, I had not.

Q. Had you had any previous conversation  
with Mr. Graven or Mr. Kelly about administering  
narcotics to anybody outside of this Mike Sanders?

[158]

A. The only conversation I had had with Kelly  
was at the time I gave him the 100 tablets of mor-  
phine; he said he wanted it to give to some man he  
had in jail.

Q. That was May 16th? A. Yes, sir.

Q. And this was May 24th?

A. And that is why I think he referred to the  
man he spoke to me about. He didn't mention any  
names when he talked to me.

Q. Did you make any examination to see if the  
man needed any treatment other than narcotics?

A. No, I did not.

Q. Did you make any examination of him at all?

A. No, sir.

(Testimony of Dr. E. H. Teed.)

Q. You just asked what he wanted?

A. That is correct.

Q. With reference to this Mr. Graven, as I get it, when he came to your office on April 10th, the first you knew of him, he walked in the door?

A. Correct.

Q. And Shirley had been in your office a half an hour or so?

A. Twenty minutes to half an hour.

Q. From the time she came in first until Mr. Graven walked in the door, had she left your private office? A. Not that I recall. [159]

Q. That was the time you refused to give her any further prescriptions? A. Yes, sir.

Q. Up to that time you had not refused her?

A. No.

Q. The previous one was April 4th?

A. April 8th.

Q. And did you give her any reason for refusing to give her any further prescriptions at that time?

A. Yes, sir. I told her I thought that they were going too strong.

Q. What did you mean by "they"?

A. Whoever was getting these prescriptions was using too much.

Q. And did she ask you for some for herself?

A. No, sir.

Q. Did either of you make any suggestion the prescriptions you had issued should be issued in her name?

(Testimony of Dr. E. H. Teed.)

A. I don't recall there was any suggestion made then.

Q. In any event, you did not do so?

A. No, sir.

Q. Did you furnish her any narcotics yourself at that time? A. No, sir.

Q. Did you have any there in your office? [160]

A. No, sir.

Q. At any time during this period from about January 1st or December 30th on, did you ordinarily carry any narcotics in your office?

A. No, sir; I never keep any narcotics in the office.

Q. You never have any narcotics in your office?

A. No, sir.

Q. Did you write a prescription for Wesley Doores at the time you administered to him as Mr. Emory? A. No.

Q. Where did that tablet come from?

A. I had it in my pocket.

Q. Did you usually carry a tablet of that sort in your pocket? A. I carry a few.

Q. What do you mean by a few?

A. Oh, five or six or eight or ten.

Q. That is your constant practice?

A. Yes, sir.

Q. I believe you said at one time during the course of these trips you bought 1,000 quarter grains from McKesson and gave 400 to Shirley and kept 600? A. Yes, sir.

(Testimony of Dr. E. H. Teed.)

Q. Had you kept a quantity that large before?

A. No, sir.

Q. Had you previously purchased in quantity from McKesson? [161]

A. I think that is the first purchase I ever made from McKesson.

Q. Is that the first purchase you ever made from any wholesaler?

A. No, sir. I had made a purchase, I think in September or October, of 100 quarter-grain tablets or half-grain tablets, I don't remember which, from one of the other drug houses, either Park-Davis or Eli.

Q. I mean, from December 30th on.

A. No, sir.

The Court: Where did you keep your narcotics you said you did not keep in your office? You must have had more than five or ten around. Every doctor should have morphine in case he came upon an accident.

A. I never kept any morphine to speak of. This is the way I carry them (indicating).

Q. (Mr. Gleeson) From what source did you replenish your supply?

A. I think the only source I replenished my supply from was the small amount I bought occasionally from the wholesalers.

Q. You did not buy from the wholesalers in quantity? A. No.

Q. Where did you keep your supply?

(Testimony of Dr. E. H. Teed.)

A. I carried them in my pocket. [162]

Q. In any event, you say you bought 100 from the jobber or wholesaler? A. Yes, sir.

Q. And you carry eight or ten on your person?

A. When I had—the bottle I first bought with 100, I carried it in my pocket, and as I used those I got a smaller bottle and carried it in my pocket.

Q. When you got down to eight or ten you bought another bottle? A. Yes, sir.

Q. Now, as far as this man Graven is concerned, the first thing you knew he walked in the door, and that was when you came out to the patients in the office?

A. Yes, sir. There were two or three or maybe four patients in the office.

Q. And did they continue to wait?

A. Yes.

Q. Did Shirley introduce this man in their presence?

A. No. She came in the private office and shut the door and did the introducing.

Q. And she said he was a Federal Narcotic Agent from Seattle?

A. Yes, sir. He walked right in and announced he was a Federal Narcotic Agent.

Q. And he said "Hello, Shirley; what are you doing here"? A. Yes, sir. [163]

Q. And Shirley left? A. Yes, sir.

Q. When he first introduced himself did he say who he was?

(Testimony of Dr. E. H. Teed.)

A. Yes, sir. He said "I am Mr. Graven, from the narcotic office in Seattle."

Q. And after he had introduced himself you say that Shirley introduced him all over again?

A. Yes, sir.

Q. What did she say?

A. She said "This is Mr. Graven, the narcotic man from Seattle."

Q. She virtually repeated his words?

A. Yes, sir.

Q. And he pulled out his identification?

A. Yes, sir.

Q. Did he offer it to you? A. No, sir.

Q. Did you ask for it?

A. No, sir. I didn't ask him.

Q. How was it carried?

A. He took it out of his inside pocket and pulled it out like this (indicating) and said "Here is my identification."

Q. He pulled it halfway out? A. Yes, sir.

Q. You have seen identifications of federal officers before? [164]

A. Yes; but I didn't ever pay any particular attention to them.

Q. In any event, you made no request to see his identification? A. No, sir.

Q. You never did at any time? A. No, sir.

Q. Did you ever make any inquiry of your own to determine whether there was such an agent?

A. I had heard there was a federal agent by that name.

(Testimony of Dr. E. H. Teed.)

Q. When?

A. Oh, I don't know when, but sometime before that.

Q. Did Shirley finally tell you there was no such person as Mike Sanders? A. No.

Q. Is it not a fact, sir, that she did tell you during the course of your writing these prescriptions that there was no such person as Mike Sanders, and you continued the practice of writing prescriptions in the name of Mike Sanders, a fictitious person, and you knew it would end in trouble for you?

The Court: That is an awfully involved question.

Mr. Gleeson: I will break it down.

Q. Is it not a fact that during the period you were writing prescriptions in the name of Mike Sanders that Shirley [165] Doores advised you that it was a dangerous thing to do, and that there was no such person as Mike Sanders, and that writing prescriptions in the name of a fictitious person you would get yourself involved in trouble?

A. I don't recall any such conversation as that regarding Mike Sanders, but she did mention that if a person wrote a prescription in the name of somebody that didn't exist why there was a good chance for trouble.

Q. She told you that after you had written the prescriptions in the name of a man you never had seen?

A. I don't know whether it was after I began doing that or before.

(Testimony of Dr. E. H. Teed.)

Q. It might have been before you started writing prescriptions for Mike Sanders?

A. It might have been, but I knew that already, anyway, that writing prescriptions for a fictitious person was dynamite, and I never did it to my knowledge.

Q. But even knowing that, you still make no investigation to determine who Mike Sanders was?

A. Except taking Shirley's word for it.

Q. Well, after Shirley came back, Graven identified himself and Shirley left, and you had some conversation with him? A. Yes, sir.

Q. And he told you he had a warrant for you in his pocket? A. Yes, sir. [166]

Q. But he did not serve it then, and he said he would not until he communicated with Seattle?

A. Correct.

Q. Did you ask to see the warrant?

A. No, sir.

Q. Did you ask who issued it or from what court it was issued?

A. I took it from what he said, it was issued by the Narcotics Bureau in Seattle.

Q. And did you make any investigation to determine whether or not there was any warrant issued in Coeur d'Alene? A. No.

Q. You knew there was a Federal Court in Coeur d'Alene? A. It wasn't in session.

Q. But that is one of the places where the Federal Court of that district holds court?

A. Yes, sir.

(Testimony of Dr. E. H. Teed.)

Q. You have lived in Coeur d'Alene for eighteen years? A. Yes, sir.

Q. And you have been a practicing physician there during that period? A. Yes, sir.

Q. Did you ever testify in that court?

A. Yes, sir.

Q. I refer to the Federal Court.

A. No, sir; I never testified in Federal Court that I know of. [167]

Q. What other trappings did this man Graven have to identify him?

A. The only other thing he had was a briefcase he had some papers in.

Q. What kind of papers?

A. Some of it looked—they were yellow and some white.

Q. Did he open them up? A. Partially.

Q. To get some papers?

A. I don't know what the occasion was for him partly opening it, unless it was just to show that he had some papers.

Q. The warrant was in his pocket, he said?

A. Yes, sir.

Q. Did he offer you any badge or star?

A. No, sir; he didn't.

Q. Did you ask to see any badge or star?

A. No, sir; I didn't.

Q. Did you ask him where his office was?

A. No, sir.

Q. Or how you could get in touch with him?

A. No, sir.

(Testimony of Dr. E. H. Teed.)

Q. Did you make any effort to get in touch with him at any time? A. No.

Q. Did you talk to anyone in an attempt to get in touch with him? [168]

A. Except when I asked Shirley to find out from Graven how much he wanted for a pay-off.

Q. Did you make any effort to determine the name of this man was actually Graven?

A. I had no way of finding out.

Q. Did you keep a record of the serial numbers of bills that you turned over to Shirley?

A. I did not.

Q. You knew that bills had serial numbers, did you not? A. Yes, sir.

Q. Did you keep any description of any kind of the bills so that they might be identified?

A. No.

Q. Did you keep any record any place of the amount of money you turned over?

A. No written record.

Q. At the time this man came back to you, Kelly or Graven, I guess the next time was May 16th?

A. Yes, sir.

Q. At that time did he offer any identification?

A. No, sir.

Q. Did he have any briefcase with him?

A. No, sir.

Q. How did he make entry to your office at that time?

A. Why, I think at that time he came there

(Testimony of Dr. E. H. Teed.)

was nobody in the [169] office, and he just came right in.

Q. Do you recall what time of day it was?

A. It was in the forenoon.

Q. And that was when he wanted the \$200 or the \$250? A. Yes, sir.

Q. And that was a rather inconsiderable amount in view of what you had been paying?

A. Yes, sir.

Q. Did it make any impression on you in that way? A. No, sir.

Q. Did you say "Why, I just gave you \$14,000"?

A. No, sir. The only explanation that was given was that these two narcotic men he was trying to head them off, and so he gave them \$250 out of his own pocket.

Q. After you had paid better than \$14,000?

A. Yes, sir.

Q. Within the period of a few weeks?

A. Yes, sir.

Q. Did you say anything about this \$14,000 at that time? A. No, sir.

Q. Was there any reason for not mentioning it?

A. I don't think there was any reason for not mentioning it, and probably there was no reason for mentioning it.

Q. At any time during that discussion did the matter of the amount you had paid him previously come up? [170]

A. I believe that there was something said at that time how much I had paid Shirley.

(Testimony of Dr. E. H. Teed.)

Q. Are you certain of that?

A. I am not quite clear, but I believe he did ask me how much I had paid her.

Q. Do you recall what you replied?

A. If I answered him at all, I told him. I told him how much I had paid.

Q. You mean you don't know whether you answered him or not? A. I am not sure I did.

Q. Do you recall him making any expression with reference to the amount you claim to have paid?

A. The only think I recall is he did say that he had only gotten \$500.

Q. Out of the \$14,000? A. Yes, sir.

Q. Did you take that up with Shirley?

A. No.

Q. Did you ever take it up with Shirley?

A. No.

Q. You never asked Shirley to account for the difference?

A. No, sir. I didn't get to see Shirley after that.

Q. Shirley was there on the 25th, was she not?

A. Yes, but I was not discussing anything with her about it at that time. [171]

Q. Did you make any attempt to get in touch with Shirley? A. No, sir.

Q. You did not know there was anything wrong with it until the 24th? A. Yes, sir.

Q. And when you knew on the 16th out of this \$14,000-odd that was intended for Graven, he had

(Testimony of Dr. E. H. Teed.)

received only \$500, did you make any attempt to get in touch with Shirley between the 24th and that time to determine what she had done with the balance? A. No, sir.

Q. You knew where she lived?

A. Yes, sir.

Q. Were you in Spokane during that period?

A. No.

Q. After this \$6,500 was paid in the latter part of April, you went back to Haley, Idaho?

A. Yes, sir.

Q. Where is Haley?

A. It is in southern Idaho in Blaine County, twelve miles below Sun Valley.

Q. About how far from Coeur d'Alene?

A. Six hundred miles.

Q. And you came back on May 7th?

A. Yes, sir. [172]

Q. And by that you mean you came to Coeur d'Alene? A. Yes, sir.

Q. Did you make any attempt to get in touch with Shirley after that? A. No, sir.

Q. And prior to May 25th, the last time you saw Shirley was on about April 24th?

A. Yes, sir.

Q. Do you recall when you were last at her house?

A. The only time I was out to her house was on the 22nd of April.

Q. That was about what time of day?

(Testimony of Dr. E. H. Teed.)

A. That was in the morning, probably around 9:00 or 9:30.

Q. And she immediately took you over to some local sandwich place? A. Yes, sir.

Q. How long were you in the house?

A. I wasn't in the house. I waited in the car until she got dressed.

Q. Did you see anyone in or about the house at all? A. No, sir; except her.

Q. Did you knock at the door?

A. Yes, sir. And she opened the door probably two or three inches, and told me she would be out as soon as she got dressed. [173]

Q. And that was when she wanted the \$6,500?

A. Yes, sir.

Q. And she never discussed the matter with you about the house at all? A. No, sir.

Q. And at the door there was no conversation at all except to say that she would be out in a few minutes? A. Yes, sir.

Q. After she left the sandwich booth where did she go?

A. I don't remember. I think I took her back partly within two or three blocks of the house, and then I went on down town.

Q. Was there any reason why you did not take her all the way to the house?

A. She asked me to drop her off before we got to the house.

Q. And she asked you to drop her off a couple of blocks from her house? A. Yes, sir.

(Testimony of Dr. E. H. Teed.)

Q. And you kept on going and she walked on home? A. Yes, sir.

Q. Was there anyone there to meet her?

A. I didn't see anybody.

Q. This 'phone call from this public booth was on what day?

A. That was on Saturday morning.

Q. And do you know where this sandwich counter was? [174]

A. I don't think I could locate it.

Q. Was there anything about it that impressed you so you could identify it?

A. No, sir. The only thing I recall about it was it was on Trent.

Q. Do you know where the highschool is there —was it near that?

A. I don't remember whether it was close to the highschool or where it was, but it seems to me like it was on Trent and close to where she lives there, around Millwood.

Q. How big a place was it?

A. It wasn't a very big place. They had a counter and some booths.

Q. And you say there was a telephone in a booth?

A. There was a telephone there. I think it was in a booth.

Q. You mean a regular telephone booth where you go in and lock yourself in?

A. I think so.

Q. Do you recall that definitely?

(Testimony of Dr. E. H. Teed.)

A. No, I don't.

Q. You are sure it was not out on the counter or over by the cash register?

A. I am pretty sure it was in some kind of an enclosure.

Q. Were you able to see her?

A. Not from where I was. [175]

Q. Were you in one of the booths or at the counter? A. I was in a booth.

Q. Were you facing her or did you have your back to her?

A. I don't remember about that, which way I was facing in the booth.

Q. Did you see Shirley go to the 'phone?

A. I saw her going toward what was supposed to be the 'phone.

The Court: Do you know whether there was a 'phone there?

A. Yes, sir; there was some kind of a 'phone there.

Q. (Mr. Gleeson) You are sure of that?

A. Yes, sir.

Q. And you saw the 'phone yourself?

A. I am pretty sure I did.

Q. Do you know whether it was in front or in the back of the place?

A. It seems to me like it was kind of in the center where the cashier's counter was, or whatever they had there.

Q. That was where the booth was?

A. Yes, sir.

(Testimony of Dr. E. H. Teed.)

Q. A regular telephone booth?

A. I think so, yes.

Q. In any event, you think you saw a 'phone there? A. Yes, sir.

Q. But Shirley told you, anyway, she was going to 'phone? [176] A. Yes, sir.

Q. Do you recall how long she talked?

A. It must have been ten minutes at least.

Q. Did she have to wait for the call or did she stay there while the call went through?

A. She stayed there until it went through.

Q. Do you know how she paid for the long-distance call? Do you know whether it was a pay 'phone? A. No, sir.

Q. Do you know whether it was a wall 'phone?

A. No, sir.

Q. Or an ordinary desk 'phone?

A. I don't know.

Q. Do you know whether she notified the proprietor she was going to place a long-distance telephone call? A. I don't know that.

Q. Do you know whether she paid the proprietor or anyone else for the use of the 'phone afterwards? A. No; I don't recall.

Q. Do you recall who served you, a man or a woman, or a girl? A. A girl.

Q. Do you know what she served you?

A. Coffee.

Q. Well, was there any reason given by Shirley for not talking with you in her own home when you first came? [177]

(Testimony of Dr. E. H. Teed.)

A. Yes, sir. She said her sister-in-law, I believe, was there, and she didn't want her to listen in.

Q. Her sister-in-law?

A. I believe that is who she said was there.

Q. Did she give you any reason for not having you bring her back to the house?

A. No, sir. She just asked if I would drop her off before we got to her house.

Q. Did she tell you who her sister-in-law was?

A. No.

Q. In any event, when she got through with the telephone she told you what?

A. She told me she had contacted Graven in Seattle.

Q. Oh, by the way, during the time that you say Graven wanted money, he also wanted a large quantity of narcotics? A. Yes, sir.

Q. You knew by that time, of course, that Shirley was a user?

A. Well, as much as I ever knew about her being a user.

Q. During the time you were supplying her under the name of Mike Sanders, did you have any reason to believe she wanted these for herself?

A. No, sir; I didn't at that time.

Q. At the time you talked to Kelly, as Graven, on May 16th, did you say he told you *he only* \$500, and did you ask [178] him about the narcotics?

A. No, sir; I didn't.

Q. Did he say anything to you about narcotics?

(Testimony of Dr. E. H. Teed.)

A. Except he wanted some for this man he said was in jail.

Q. That is the 100 grains?

A. One hundred tablets.

Q. That \$6,500 was for Bangs?

A. Yes, sir.

Q. Had you ever known Bangs?

A. No, sir.

Q. Had you ever heard of him?

A. I had heard of him.

Q. Did you make any investigation concerning Bangs to determine who he was?

A. No, I didn't.

Q. You made no inquiry? A. No.

Q. Except what Shirley told you?

A. That is all.

Q. And you left Shirley what time that Saturday?

A. That was about—it must have been about one o'clock.

Q. About one o'clock on Saturday afternoon when you gave her the \$3,000? A. Yes, sir.

Q. That was here in Spokane? [179]

A. Yes, sir.

Q. And the next morning she was back again?

A. No; Sunday evening she called me when she got back from Seattle.

Q. Sunday? What time Sunday?

A. About four-thirty or five o'clock; maybe a little later.

(Testimony of Dr. E. H. Teed.)

Q. Did she tell you what means of transportation she had used?

A. Yes, sir; she said she drove over. She said, "We drove over."

Q. "We?"

A. She said she had somebody drive her.

Q. They drove to Seattle between one o'clock on Saturday and back again by four o'clock Sunday afternoon? A. Yes, sir.

Q. And did she say she was supposed to drive back again Sunday evening?

A. Yes, sir—no. She was supposed to have the other \$3,500 there by Monday evening.

Q. But sometime between Sunday—you didn't give her the money until Monday? A. No.

Q. After the banks opened? A. Yes, sir.

Q. And she was going to drive back again that afternoon? A. Yes, sir. [180]

Q. Did you believe it?

A. It looked like a pretty big drive, but she said they had a good Buick car, and could drive it in four hours.

Q. Did she say anything about gas?

A. No. I don't think she mentioned anything about gas.

Q. Did you ask her about it? A. No.

Q. You knew gas was rationed, of course?

A. Yes; I knew that.

Q. Did that arouse any suspicion in your mind?

A. No; I don't think so.

Q. You say you left the money with Miss Cook

(Testimony of Dr. E. H. Teed.)

for safekeeping. At the same time you had a safety deposit vault, did you not?

A. No, sir; I didn't.

Q. Or a bank account?

A. I had a checking account.

Q. Was there any reason why that money was not *place* in the checking account?

A. No particular reason, except I didn't want the money in my checking account.

Q. You considered it safer with her than in a safe deposit box?

A. Yes, sir. I figured that was about as safe as I could keep it. [181]

Q. Did you make any provision what was to happen to the money if you died?

A. Not particularly, except that it was a joint account.

Q. With her and her mother? A. Yes, sir.

Q. But you had no access to the account?

A. No, sir.

Q. And as far as they were concerned, if they should die in an automobile accident, the money was gone? A. I guess it would be.

Q. How much money did you have tied up that way?

A. That is all I had tied up that way?

Q. Was \$3,500 or \$3,000?

A. A little more than that. About \$5,000 in each account.

Q. About \$5,000 in each account?

A. Yes, sir.

(Testimony of Dr. E. H. Teed.)

The Court: How long had you had the money in these accounts?

A. One was opened in 1940 and the other in 1942.

The Court: What did you put it in those accounts for?

A. Just for safekeeping.

The Court: Safe against what?

A. In case somebody got a judgment against me or something, I might be able to salvage a little.

The Court: Was somebody threatening you with a suit? [182]

A. No, but you never know.

Q. (Mr. Gleeson): These were a part of your regular earnings? A. Yes, sir.

Q. Regularly reported on your income tax?

A. Yes, sir.

Q. And were they in a saving account or a checking account? A. A savings account.

Q. Who got the interest on the savings?

A. The interest was applied to the deposit.

Q. Did you place the amount there in a bulk sum or in small amounts? A. Small amounts.

Q. Over a period of about three or four years?

A. Well, not that long.

Q. About how long?

A. Oh, probably around a year.

Q. I think you said in 1940 or 1941?

A. The first was in 1940 and the other was opened in 1942.

(Testimony of Dr. E. H. Teed.)

Q. If you had these accounts in safekeeping from somebody who you thought might sue you sometimes, what was your reason for placing it in two accounts?

A. The only reason for placing it in two accounts is that an account up to \$5,000 is insured, and above that it is not.

Q. And you placed the two accounts for that reason? [183] A. Yes, sir.

Q. Did anyone else have knowledge that these accounts were there and belonged to you, other than Miss Cook and her mother?

A. I don't think so.

Q. Are you married? A. Yes, sir.

Q. And you have a family? A. Yes, sir.

Q. And your wife knew nothing of this arrangement?

Mr. Connelly: I object to that as not proper cross-examination, and as not being material or relevant to the inquiry we are conducting here.

The Court: The objection is overruled.

Q. (Mr. Gleeson): Did your wife know anything about it?

A. If she did I didn't know anything about it.

Q. How long did Miss Cook work for you?

A. Since 1935.

Q. When you paid these amounts to Miss Cook for deposit in her name, did you take any receipt from her? A. No, sir.

Q. Did you have any acknowledgement of any

(Testimony of Dr. E. H. Teed.)

kind from Miss Cook that these monies belonged to you? A. No.

Q. Had her mother ever worked for you? [184]

A. No, sir.

Q. She opened the first account in 1940 or 1941, and when was the next one opened?

A. The first one was in 1940 and the second was in 1942.

Q. Did you see Wesley Doores at any time prior to the time he came up there on May 24th to get this prescription? A. May 16th.

Q. Between the 16th and the 24th?

A. No. I had never seen him before that.

Q. This letter is dated May 24th, and I see in the upper lefthand corner May 27th. Do you know what that indicates—May 27th?

A. I think that must be the time I turned it over to the FBI.

Q. But in any event, prior to the 24th you had never seen the man? A. No.

Q. Except you say on May 16th you might have?

A. No, sir.

Q. You never saw him after that until this matter came up? A. No.

Mr. Gleeson: That is all.

#### Re-Direct Examination

By Mr. Connelly:

Q. Why didn't you go and look up Shirley Doores after Mr. Kelly told you he had got only \$500 of this money, Doctor? [185]

(Testimony of Dr. E. H. Teed.)

A. Well, I suppose the reason I did not, I didn't think it would do any good or make any particular difference, and I didn't know whether he was telling the truth or whether he was just trying to trap me someway.

Q. You had also been told that some of this money went to Bangs, the Chief Inspector?

A. Yes, sir.

Q. And two narcotic agents whe were in on it?

A. Yes, sir.

Q. And the other agent and a clerk to whom some of it was supposed to go? A. Yes, sir.

Q. That is what you were told by Shirley?

A. Yes, sir.

Mr. Connally: That is all.

#### Re-Cross Examination

By Mr. Gleeson:

Q. This note that Wesley Doores brought to you was dated May 24th. Was it delivered on the same day?

A. I couldn't remember what date he was there, but that is the date—I suppose that is the day he delivered it.

Q. Do you recall what time of day he was there?

A. It was in the afternoon. [186]

Q. Do you recall about what time in the afternoon?

A. No. I think probably around three—two or three o'clock.

Q. About around two or three o'clock in the afternoon of May 24th?

(Testimony of Dr. E. H. Teed.)

A. I wouldn't swear it was that day, but it was pretty close to that. It was after the 16th.

Q. You have no recollection, have you, at the time you received the note, it was dated in advance of the day he came there? A. No.

Mr. Gleeson: That is all.

Mr. Connelly: That is all.

(Witness excused) [[87]]

---

### EDWARD T. HAY

called as a witness by the Plaintiff, first duly sworn, testified as follows:

#### Direct Examination

By Mr. Connelly:

Q. State your name. A. Edward T. Hay.

Q. Where are you employed, Mr. Hay?

A. At the First Federal Savings & Loan Association.

Q. In Spokane? A. Yes, sir.

Q. You are an officer of that organization?

A. Vice-president.

Q. How long have you been identified with that banking organization? A. For 12 years.

Q. I will ask you to state whether or not you have any records of a savings account or stock-purchase savings account of Georgia Cook or Edna E. Cook, of 815 7th Street, Coeur d'Alene, Idaho?

A. Yes, sir; I do.

(Testimony of Edward T. Hay.)

Q. Will you state to the court and jury how substantial withdrawals are made from a savings account of the character I have just referred to?

The Court: Is there some different way when you draw out a certain sum of money? [188]

Mr. Connelly: I did not make it clear.

Q. May withdrawals be made in cash or by check? A. Yes, sir.

Q. Substantial withdrawals? A. Yes, sir.

Q. In or during the month of April, 1944, did your bank carry an account in the First National Bank of Spokane? A. Yes, sir.

Q. Did you issue your cashier's checks or drafts on the First National Bank of Spokane from your institution? A. Yes, sir.

Q. For depositors who were withdrawing substantial amounts from their accounts?

A. Yes, sir.

Q. I wish to direct your attention to plaintiff's identification numbered "19", and ask you to state what it is, and by what institution it has been issued, and what it represents.

A. It is a pass book issued by the First Federal Savings & Loan Association, in the name of Georgia Cook, of Coeur d'Alene, Idaho, under our number 19,248.

Q. Will you state whether or not any withdrawal as of April 7, 1944, is indicated on that pass book? A. It is.

Q. What is the amount of the withdrawal? [189]

A. Three thousand five hundred dollars.

(Testimony of Edward T. Hay.)

Q. I hand you plaintiff's identifications "20" and "21", and ask you to state what they are?

A. Identification "21" is our ledged record of the above-mentioned Account No. 19,248, in the name of Georgia or Edna Cook.

Q. What is "20"?

A. No. "20" is our ledged record No. 15,590, in the name of Edna E., or Georgia Cook.

Q. Is that a separate account?

A. Yes, sir; that is a separate account.

Q. Now handing you plaintiff's identification "23", I will ask you to state what it is, and what relation it may bear to plaintiff's identifications "19", "20" and "21"?

A. It is a check drawn on the First National Bank of Spokane, by the First Federal Savings & Loan Association, payable to Edward H. Teed, in the amount of \$3,500, dated April 7, 1944.

Q. Directing your attention to plaintiff's identification "21", I will ask you to state whether or not a withdrawal as of April 24, 1944, is indicated on that ledger sheet?

A. Yes, sir. There is a withdrawal of \$1,671.46.

Q. Handing you plaintiff's identification "22", state what it is and what relationship it bears to the testimony you have just given and to identification "21". [190]

A. Number "22" is a check drawn upon the First National Bank of Sponkane by the First Federal Savings & Loan Association, payable to

(Testimony of Edward T. Hay.)

Edward H. Teed, in the amount of \$1,671.46, dated April 24, 1944.

Mr. Connolly: I offer identifications "19", "20", "21", "22" and "23" in evidence.

(Short recess.)

The Court: Any objection to these exhibits?

Mr. Smith: Were these checks payable to the order of Edward H. Teed made that way at the direction of the owner of the accounts?

A. Yes, sir.

Mr. Smith: They gave you directions in writing what to do?

A. To the teller making the withdrawal orally.

Mr. Smith: Instead of making out the checks in whose name the account stood, you made them out to Edward H. Teed, at their direction?

A. Yes, sir.

Mr. Smith: We have no objection.

The Court: Did this \$1,671.46 close out the account?

A. One of them did. I do not remember which one.

The Court: Plaintiff's Exhibits "19", "20", "21", "22" and "23" are admitted.

(Cook pass book, "19", First Federal ledger record, "20", First Federal ledger record, "21", Check, First Federal to Teed, "22", Check, First Federal to Teed, "23", admitted to evidence) [191]

(Testimony of Edward T. Hay.)

Mr. Connelly: That is all.

Mr. Smith: No questions.

(Witness excused.)

---

### H. P. STOMMELL

called as a witness by the Plaintiff, first duly sworn, testified as follows:

#### Direct Examination

By Mr. Connelly:

Q. What is your name?

A. H. P. Stommell.

Q. Where do you reside?

A. At Boise, Idaho?

Q. What is your business?

A. Manager of the Mountain Telephone & Telegraph Company.

Q. I will ask you if you have custody and control of tickets or records kept of long-distance calls in your area? A. I do.

Q. Going out of your area? A. Yes, sir.

Q. Have you a record of a long-distance telephone call from Haley, Idaho, to Walnut 1635, Spokane, for April 20, 1944? A. I have.

Mr. Connelly: May we mark a photostatic copy the same identification number? I would like to show the [192] original to the jury, and substitute the photostatic copy for the record.

The Court: You have no objection to the photostatic copy being substituted, Mr. Smith?

(Testimony of H. P. Stommell.)

Mr. Smith: None, Your Honor.

Q. (Mr. Connelly) Showing you plaintiff's identification "26", what place has that in your business?

A. This is the record of long-distance calls placed at Haley, Idaho, on April 20, 1944, and it was placed at Spokane, Walnut 1635, at 3:12 and the conversation was over at 3:16 p. m.

Q. Who placed the call?

A. We have no record of the party who called or the person called.

Mr. Connelly: I wish to offer plaintiff's identification "26" in evidence, and substitute the photostat, which is also marked "26" for the original.

Mr. Smith: No objection to the offer or to the substitution.

The Court: It may be admitted.

(Record of telephone call Haley, Idaho, to Spokane, April 20, 1944, admitted in evidence as plaintiff's exhibit "26".)

[Printer's Note]: Set out in full at page 59 of original reporter's transcript.

Mr. Smith: No cross-examination.

(Witness excused.) [193]

No. 10972

---

United States  
Circuit Court of Appeals  
for the Ninth Circuit.

---

GEORGE CLAYTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record  
In Two Volumes  
VOLUME II  
Pages 265 to 525

---

Upon Appeal from the District Court of the United States  
for the Eastern District of Washington,  
Northern Division

FILED

JUL 11 1945

PAUL P. O'BRIEN,  
CLERK



No. 10972

---

United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

GEORGE CLAYTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record  
In Two Volumes  
VOLUME II  
Pages 265 to 525

---

Upon Appeal from the District Court of the United States  
for the Eastern District of Washington,  
Northern Division



## L. H. HOCUM

called as a witness by the Plaintiff, first duly sworn, testified as follows:

## Direct Examination

By Mr. Connelly:

Q. Please state your name.

A. L. H. Hocum.

Q. Where are you employed?

A. At the Spokane-Eastern Bank.

Q. In what capacity?

A. Assistant cashier.

Q. In that capacity will you state whether or not you have custody and control of the records of the savings accounts of various individuals?

A. All the officers have access to all the records of the bank.

Q. Have you any records for Account No. 166,213, in the name of Edna E. Cook or Georgia Cook? A. Yes, sir.

Q. May I have them?

(Records handed counsel by witness.)

I hand you one you did not hand me, plaintiff's identification "27", and ask you to state what it is.

A. This is the savings pass book in the name of Edna E. Cook or Georgia Cook.

Q. When was that account opened?

A. October 14, 1942. [194]

Q. What are plaintiff's identifications "28", "29" and "30"?

The Court: Take "28" first.

(Testimony of L. H. Hocum.)

Q. Take this one first?

A. Exhibit "28" is a request for a cashier's check or draft, dated April 7, 1944, payable to Edward H. Teed, with the name of the purchaser Edna E. Cook, withdrawing \$3,500, showing it had been withdrawn from the savings account.

Q. What is plaintiff's identification "29"?

A. That is the original ledger card of the account of Edna E. Cook, showing deposits and withdrawal of the balance.

Q. It corresponds with the pass book, No. "27"?

A. Yes, sir. This "29" corresponds with the pass book.

Q. What is plaintiff's identification "30"?

A. This "30" is a cashier's check, dated April 7, 1944, payable to Edward H. Teed, in the amount of \$3,500.

Q. What relationship, if any, does "20" bear to "28"?

A. This is the request they gave when they order the check.

Q. In other words, identification "30" was given in compliance with this request? A. Yes, sir.

Mr. Connelly: I offer plaintiff's identifications "27", "28", "29" and "30" in evidence.

Mr. Smith: I think there is no objection.

The Court: They may be admitted. [195]

(Plaintiff's exhibits admitted in evidence as follows: Spokane-Eastern Bank, savings account of Cook, as "27"; Cashier's check, same bank, Cook to Teed, as "28"; Cook Ledger

(Testimony of L. H. Hocum.)

Card, same bank, as "29"; Cashier's Check, same bank to Teed, as "30".)

[Printer's Note]: Set out in full at page 61 of original reporter's transcript.

**Mr. Connelly:** That is all.

**Mr. Smith:** No cross-examination.

(Witness excused.)

---

### VERN STEVENSON

called as a witness by the Plaintiff, first duly sworn, testified as follows:

#### Direct Examination

By Mr. Connelly:

- Q. Please state your name.  
A. Vern Stevenson.
- Q. Where do you reside? A. Spokane.
- Q. What is your business?  
A. Bus driver for the Auto Interurban Company.
- Q. Were you so employed on April 10, of this year? A. I was.
- Q. Over what route did you drive your bus?  
A. From Spokane to Coeur d'Alene and return.
- Q. And along what road—do you go by way of Apple Way or the [196] Trent road?  
A. The Trent Road.
- Q. Directing your attention to that day, April 10th, and again directing your attention to the lady

(Testimony of Vern Stevenson.)

sitting against the brass rail, and the gentleman sitting against the brass rail, I will ask you to state whether or not you observed either of them as passengers on your bus that day? Stand up, if you wish.

A. I did.

Q. What time of the day was it?

A. On the first trip out of Spokane in the morning. I left the depot at 7:15.

Q. Can you tell us where each of those persons got on your bus?

A. Mr. Kelly, the man, took a cab, he had missed the bus at the depot, and he took a cab out to Parkwater, and got the bus at Parkwater. The driver flagged the bus, and he got on the bus.

Q. Where did the lady get on your bus?

A. Out on the Trent Road.

Q. How far apart?

A. The lady got on about a mile after he did.

Q. Do you know whether or not they sat together or separately during that trip?

A. Well, when they first got on the car was full, and there were [197] no two seats together, but after I went by the aluminum plant I let *our* some employes of it there, and then they sat together to Coeur d'Alene.

Q. Did they get off at Coeur d'Alene?

A. Yes, sir; at the bus depot.

Q. Did you see them after that?

A. No, sir. Not that day.

Q. When did you later see them?

(Testimony of Vern Stevenson.)

A. It was either the next day or the following day; I wouldn't say which one, but at that time Mr. Kelly got on at the depot, and Miss Doores at the Park Road.

Mr. Connelly: You may cross examine.

### Cross Examination

By Mr. Smith:

Q. When was this last incident?

A. I wouldn't be sure of it, whether it was the following day or the day after.

Q. The following day or the day after?

A. Yes, sir.

Q. These same two people that rode up with you on the 10th of April?

A. One got on at Park Road and the other at the stage depot.

Q. That is two trips they made to Coeur d'Alene? A. That is right.

Q. Within a period of two days? [198]

A. As near as I can tell it was within a period of two days.

Q. What is it that recalls to your mind the first trip was on April 10th?

A. At the time I was contacted by the Federal Agent at Coeur d'Alene, he asked if I remembered these people, and he asked me about the time, and I told him it was around the first part of April.

Q. How long after this incident of April 10th was it that you were contacted by the agent at Coeur d'Alene?

(Testimony of Vern Stevenson.)

A. Either the latter part of May or the first part of June.

Q. And you had remembered more than a month and a half before these two people got on your bus?

A. I did, yes, sir. Not particularly the date, but I remembered they got on the bus.

Q. Did you also tell this agent at the time they had made the second trip to Coeur d'Alene within a period of two days? A. I did.

Q. And did you tell him you hauled them back from Coeur d'Alene, or do you know how they got back?

A. I don't know how they got back.

Q. Did they ride back with you on the April 10th or the first trip? A. No, sir.

Q. What time do you come back? [199]

A. My last trip out of Coeur d'Alene is 2:35 in the afternoon.

Q. Do you lay over there?

A. No, sir. I drive three trips.

Q. Your last trip leaves Coeur d'Alene at 2:35?

A. Yes, sir.

Q. And when you arrive at Spokane on that trip you are through work?

A. Yes, sir. Unless I have to go out on the next run.

Q. Were there any other buses running between Coeur d'Alene and Spokane on that day?

A. They run each hour. There is an hourly schedule.

(Testimony of Vern Stevenson.)

Q. And you make three of the trips?

A. Yes, sir.

Q. You do not recall that you hauled either of these people back on the 10th of April?

A. No, sir.

Q. But you do have a definite recollection you hauled them up there twice within the period of two days? A. Yes, sir.

Mr. Smith: That is all.

#### Redirect Examination

By Mr. Connelly:

Q. Had the lady been a passenger on your bus previously? A. Yes, sir.

Q. You knew her by sight as a passenger? [200]

A. Yes, sir.

Q. And you do recall the taxicab incident with reference to the man? A. I do.

Mr. Connelly: That is all.

(Witness excused.)

---

#### ERICK R. ERICKSON

called as a witness by the Plaintiff, first duly sworn, testified as follows:

#### Direct Examination

By Mr. Connelly:

Q. Your name, please.

A. Erick R. Erickson.

Q. Where are you employed?

(Testimony of Erick R. Erickson.)

A. At the Old National Bank in this city.

Q. In what capacity?

A. Assistant cashier.

Q. Have you with you any deposit slips or records of deposits of an account under the name of George Clayton? A. I have.

Q. Will you produce them?

(Witness hands papers to counsel.)

Just generally speaking, without going into detail, will you state what the sheets comprising identification "31" represent, whose accounts, and the dates included, [201] beginning with the first date shown, and stating the last date shown?

A. These are photostatic copies of the statement of account of the Old National Bank with George T. Clayton, for the months of April, May and June, 1944.

Q. Any part of March?

A. Beginning with March 27, 1944.

Q. Now handing you identifications "32" and "33", I will ask you what those represent?

A. Each of these represents a deposit made in the Old National Bank by George T. Clayton, under date of April 12, 1944, for \$1,250—

Mr. Smith: Just a moment.

Q. (Mr. Connelly) Do not go into the amount. Will you state whether or not those are deposit slips obtained from the customer and retained by the bank as part of its files?

A. That is true.

(Testimony of Erick R. Erickson.)

Q. And with reference to the three ledger sheets, will you state whether or not these photostats are a part of the permanent records of your bank, or photostatic copies of the permanent records, ledger records, original ledger records of the bank?

A. They are photostatic copies of the original records of the bank, and the film from which these are made are permanent—part of the permanent records of the bank. [202]

Q. Whose account do "32" and "33" relate to?

A. The account of George T. Clayton.

Q. Are you personally acquainted with that depositor? A. No, sir.

Q. You have never seen him?

A. I would not say that.

Mr. Connelly: I offer plaintiff's identifications "31", "32" and "33" in evidence.

Mr. Smith: I object to them on the ground they have not been properly identified, and having no bearing on this case, in the present state of the evidence.

The Court: I will withhold the ruling as to the identification. I take it your objection is because no one has identified this defendant as being the George T. Clayton?

Mr. Smith: That is right.

The Court: It is not something this witness could do?

Mr. Smith: Yes.

The Court: I will withhold the ruling.

(Testimony of Erick R. Erickson.)

Mr. Smith: We can discuss it after the jury—will you wait outside a little while, Mr. Erickson?

Mr. Connelly: Bring the signature card of Mr. Clayton, too.

The Court: You have no cross-examination now? [203]

Mr. Smith: No, Your Honor.

(Witness excused.)

---

### W. R. KNOWLTON

called as a witness by the Plaintiff, first duly sworn, testified as follows:

#### Direct Examination

By Mr. Connelly:

Q. Will you tell the jury your name?

A. W. R. Knowlton.

Q. Where do you live? A. Spokane.

Q. What is your employment?

A. I am manager of the Pedicord Hotel, at 213 West Riverside.

Q. How long have you been manager of the Pedicord Hotel?

A. Since September 5th, of this year.

Q. Were you employed at the Pedicord Hotel prior to that time? A. No, sir.

Q. Do you have the registration records of guests of that hotel for April 21, 1944?

A. Yes, sir.

(Testimony of W. R. Knowlton.)

Q. Do you have any other record of a particular guest as of that date? Do not give the name.

(Witness hands to counsel.)

I hand you now plaintiff's identification "34" and ask you to state whether or not that is a part of the permanent records kept by the Pedicord Hotel, indicating, [204] without naming anyone, that a guest registered on April 21, 1944?

A. Yes, sir.

Q. What room was that guest, whose name appears on this identification, assigned to or given?

A. Room 214.

Q. Without naming names, will you state whether or not the guest whose name appears on identification "34" likewise appears on identification "35"? A. Yes, sir.

Q. And what is identification "35"?

A. These sheets are the disbursements of cash—in other words, the daily cash sheet.

Q. Do they carry the names of the guests?

A. Yes, sir. Also the room number and the file number or card number.

Q. The room number assigned to each guest?

A. Yes, sir.

Q. And does the name of the guest appearing on this card appear here (indicating)?

A. Yes, sir.

Q. Under the same room number?

A. Yes, sir.

Mr. Connelly: That is all. You may cross-examine.

(Testimony of W. R. Knowlton.)

The Court: You may cross-examine now, or wait until [205] these exhibits are offered in evidence.

Mr. Connelly: I will bring in the person who wrote the slips. It would be subject to that objection.

Mr. Smith: I have no cross-examination.

The Court: Just wait outside.

(Witness excused.)

---

### DR. E. H. TEED

recalled as a witness by the Plaintiff, further testified as follows:

#### Direct Examination

By Mr. Connelly:

Q. I hand you plaintiff's identification "34", and ask you to state whether or not you wrote it?

A. Yes.

Mr. Connelly: I offer plaintiff's identifications "34" and "35" in evidence.

Mr. Smith: We can see no purpose in "35", and object to it for that reason.

The Court: You have no objection to "34"?

Mr. Smith: No.

The Court: It may be admitted. I will sustain the objection to "35". I do not think it adds anything. May Mr. Knowlton be excused?

Mr. Smith: Yes.

(Witness excused.)

(Pedicord Hotel register admitted in evidence as Plaintiff's Exhibit "34")

[Printer's Note]: Set out in full at page 65 of original reporters transcript.

---

### EDNA COOK

called as a witness by the Plaintiff, first duly sworn, testified as follows:

#### Direct Examination

By Mr. Connelly:

Q. What is your name, please?

A. Edna Cook.

Q. Where do you live?

A. At 815 7th Street, Coeur d'Alene.

Q. How long have you lived there?

A. Since about 1918.

Q. Are you acquainted with Dr. E. H. Teed, of Coeur d'Alene? A. Yes, sir.

Q. Tell us whether or not you ever worked for him? A. Yes, sir; I do.

Q. How long have you worked for him?

A. Approximately ten years.

Q. In what capacity?

A. Nurse and bookkeeper.

Q. Directing your attention to plaintiff's exhibit "19" and plaintiff's exhibit "27", tell us whether or not you have seen them or had them before, and what they represent.

A. Yes, sir; I have seen both before, and they

(Testimony of Edna Cook.)

represent a joint account my mother and I have in these two banks.

Q. Name the banks.

A. The Spokane & Eastern and the First Federal Savings & Loan. [207]

Q. Will you tell us the source of the funds from which those two accounts were maintained?

A. All the money in both of them belonged to Dr. Teed.

Q. I wish now to direct your attention to exhibits "22" and "23", and to draw your attention to the dates thereon and ask you to state whether or not you have seen them before, and if so to state the circumstances under which you have seen them.

A. Yes, sir; I have seen them both, and I drew both checks, on the instructions of Dr. Teed, and turned it over to him.

Q. You turned them over to Dr. Teed?

A. Yes, sir.

Q. Turn the checks over, and tell us whether or not you recognize the signatures constituting the endorsements on each of those checks?

A. Yes, sir. That is Dr. Teed's signature.

Q. Directing your attention now to government's exhibit "30", can you tell us whether or not you have seen it before, and if so under what circumstances.

A. Yes, sir; I have seen this check before. And I drew it on the Spokane and Eastern Bank, like the other two, under the doctor's instructions.

(Testimony of Edna Cook.)

Q. What did you do with exhibit "30" after it had been issued to you by the Spokane and Eastern Bank? [208] A. I gave it to Dr. Teed.

Q. Now directing your attention to the date of April 24th, can you tell us whether or not you drew any other money in any form from the Spokane and Eastern Bank, on that day? A. On the 24th?

Q. Yes.

A. Yes. I drew \$1,600 in currency, and gave it to Dr. Teed.

Q. From the savings account indicated here?

A. Yes, sir.

Q. In what denominations was that money?

A. There were 14 \$100 bills and four \$50 bills.

Q. Where did you turn the mnoey over to Dr. Teed?

A. In the bank. It might have been—I will withdraw that—it might have been just outside the bank, but it seems he was in the bank when I handed it to him.

Q. Will you tell us whether or not you turned over any other money in addition to the sums you have indicated, to Dr. Teed, on or about the 24th of April, of this year?

A. On the 22nd of April I gave him \$3,000 in cash—in currency—of his money my mother and I were keeping for him.

Q. And where had you kept that money—where was it—in Spokane?

A. In Coeur d'Alene.

(Testimony of Edna Cook.)

Q. Is that all the money you gave Dr. Teed, or at some [209] other time did you give him any more?

A. On April 24th my mother and I loaned him \$500 in currency, a personal loan.

Q. Have you any idea what dimensions the \$500 item or the \$3,000 item was, which you gave to the doctor on the 22d of April?

A. Approximately, yes, sir.

Q. Tell us.

A. The \$3,000 was mostly \$50 bills. There were some twenties and the \$500 was in twenties and fives and tens; I think more fives and tens in the \$500 than twenties.

Q. When the cashier's checks of April 7 from the First Federal Savings and the S. & E. were handed to you, how long after that was it that you turned them over to Dr. Teed? How long after April 7th?

A. I believe it was the next day.

Q. And where did you turn them over to him?

A. In my home.

Q. At whose direction were those two cashier's checks withdrawn from the bank?

A. Dr. Teed.

Mr. Connelly: You may cross-examine.

#### Cross Examination

By Mr. Gleeson:

Q. There was \$3,000 from the account at Coeur d'Alene? [210] A. Yes, sir.

(Testimony of Edna Cook.)

Q. What bank was it in?

A. It was not in a bank.

Q. How was it kept?

A. It was in our possession at our home.

Q. You kept it someplace at home?

A. Yes, sir.

Q. You had no safe-deposit box or anything of that sort? A. No, sir.

Q. You had a total of about how much money in your name and your mother's that belonged to Dr. Teed?

Mr. Connelly: At any particular time?

Q. I mean all this time, or during the month of April?

A. Well, it must have been around \$13,000, whatever that totaled up to was what we had.

Q. There was about \$5,000 in each of the two bank accounts, and \$3,000 at Coeur d'Alene?

A. Yes, sir.

Q. When did you receive the \$3,000?

A. Yes, sir.

Q. When did you receive the \$3,000?

A. At different times.

Q. Over what periods?

A. I couldn't tell you.

Q. And was it after the last bank account had reached \$5,000?

A. I couldn't say that either.

Q. Was there any reason why the \$3,000 was not deposited in [211] a bank?

A. Not that I knew of.

(Testimony of Edna Cook.)

Q. Had you any instructions from Dr. Teed in that respect? A. No, sir.

Q. You were keeping it at home on your own initiative? A. Yes, sir.

Q. For safe keeping? A. Yes, sir.

Q. What protection did it have?

A. I don't know that either.

Q. Did Dr. Teed have any receipt or record from you indicating you held that money for his use and benefit? A. No, sir.

Q. Did he have any record from you showing any of these accounts were held for him?

A. No, sir.

Q. You had never issued any receipt or anything of that sort to him? A. No.

Q. When you gave him the \$500 did he issue a receipt to you? A. No, sir.

Q. Did you have any record or note or promise of payment or anything else to indicate that money was to be repaid to you? A. No, sir. [212]

Q. Are you related to Dr. Teed?

A. No, sir.

Q. The only acquaintance you have with him is that of employer and employee?

A. That is right.

Mr. Gleeson: That is all.

Mr. Connelly: That is all.

(Witness excused.)

The Court: The jury is now excused until tomorrow at 1:30.

(The jury then retired from the court room.)

(Whereupon an adjournment was had to the hour of 1:30 o'clock p. m., December 7, 1944, at which time, all parties being present as heretofore, including all the jury, the trial was resumed as follows, to-wit:)

---

### ERICK R. ERICKSON

recalled as a witness by the Plaintiff, further testified as follows:

#### Direct Examination

By Mr. Connelly:

Q. For the purposes of the record, you are the same Erick R. Erickson from the Old National Bank, who testified here yesterday afternoon?

A. I am.

Q. I will ask you to produce, if you have them, all of the deposit slips showing deposits made in the Old National [213] Bank, between August, 1943, and June, 1944?

The Court: That is quite an order—all deposit slips?

Mr. Connelly: By George Clayton. I beg your pardon.

Q. I now hand you Plaintiff's Exhibits for Identification 32, 33 and 36, consisting of several deposit slips, and ask you to state generally what they are, what they represent. Do not read the figures.

(Tsetimony of Erick E. Erickson.)

A. They represent deposits made in the Old National Bank to the credit of George T. Clayton.

Q. Between what dates?

A. Between the dates of August 1, 1943, and June 15, 1944.

Q. Do you have the signature card of George T. Clayton at the time this account was opened?

A. I have.

Q. May I see it? (Witness hands to counsel) What is Plaintiff's Identification No. 37?

A. It is the signature card of George T. Clayton with the Old National Bank, signed by George T. Clayton, and given for the purpose of identifying him to the bank.

Q. Have you had occasion recently to use that card in connection with the defendant in this case?

Mr. Smith: I object to that as being immaterial.

The Court: Overruled.

Q. (Mr. Connelly) Have you had occasion in the last few days [215] to use that card in connection with George T. Clayton, the defendant in this case?

A. I have.

Q. Will you state the circumstances under which you did that.

A. He called on me yesterday and asked for information—

Mr. Smith: Just a moment. I object to that as incompetent, irrelevant and immaterial.

The Court: I presume it goes to the matter of identification. I sustained the objection yesterday as to these slips because they were in no way con-

(Tsetimony of Erick E. Erickson.)

nected with this defendant. I think that is the purpose of this testimony. I do not know what the witness will testify to.

Mr. Connelly: That is the only purpose, only the matter of identification of his signature card.

Q. (Mr. Connelly) Will you go ahead and tell the circumstances.

Mr. Smith: Your Honor overrules the objection?

The Court: Yes, I will overrule the objection and allow an exception.

A. He called on me yesterday about during the noon hour and asked for information concerning his account, and I used this card to identify him as being the person entitled to receive the information.

Q. (Mr. Connelly) What name did he give you when he called [216] on you?

A. George Clayton.

Q. How did you use the card?

A. I compared the signature he gave me at the time he was in yesterday with this card to identify him.

Q. Did he write that signature in front of you?

A. He wrote his signature in front of me yesterday.

Q. This defendant? A. Yes, sir.

Mr. Connelly: At this time I offer in evidence Plaintiff's Exhibits 32, 33, 36 and 37.

Q. One other question: Will you state whether or not the Identifications 32, 33 and 36, the group of deposit slips, represent all of the deposit slips to

(Tsetimony of Erick E. Erickson.)

the credit of George G. Clayton in the Old National Bank between the dates of August 1, 1943, and June 15, 1944?

A. The man who looked up these for me informed me that there was one deposit that eluded him and he did not have time to pursue it.

Mr. Smith: That is based on hearsay, if Your Honor please.

Q. (Mr. Connelly) Did you participate in securing any of these—supervise the work in any way?

A. I called on our Assistant Auditor to do this work for me, and he produced this result. [217]

Q. What is his name? A. W. G. Pool.

Mr. Smith: We object as being incompetent, irrelevant and immaterial and having no probative force or effect in the case, and not tending to prove or disprove any issue raised by the indictment, and as being prejudicial, in the nature of a confidential communication.

The Court: Let me see them (Court examines exhibits). Are you basing it on the ground there is no proof these are the deposits?

Mr. Smith: Yes, and on that ground as well.

The Court: I will sustain it on that ground.

Mr. Connelly: I did not know somebody was assisting him. I have sent for Mr. Pool and I will offer proof on that.

The Court: I will withhold the ruling until you furnish that. I am not sure. I will hear from you on the question whether I will receive them at all,

(Tsetimony of Erick E. Erickson.)

but think you had better get Mr. Pool down here.

Mr. Connelly: I have sent for him. Do you want to cross-examine him now?

Mr. Smith: No.

(Witness excused.) [214]

---

### ESTHER SETTERS,

called as a witness by the Plaintiff, first duly sworn, testified as follows:

#### Direct Examination

By Mr. Connelly:

Q. Will you give us your name.

A. Esther Setters.

Q. Where do you live?

A. At 7224 East Carlisle.

Q. Where is that with reference to 7225 East Carlisle? A. Directly south.

Q. Do you have a telephone in your home?

A. Yes, sir.

Q. What is the number? A. Walnut 1635.

Q. Are you acquainted with the defendant, George Clayton, in this case? A. Yes, sir.

Q. How long have you known him?

A. Well, I don't know exactly when they first moved there. I met him a month or so after they moved in the house.

Q. When was that?

A. I couldn't tell you exactly.

(Testimony of Esther Setters.)

Q. Approximately?

A. About a year ago I think I met him. It was along in the winter. [218]

Q. Are you acquainted with Shirley Doores?

A. Yes, sir; I am.

Q. How long have you known her?

A. A year; maybe a little more.

Q. The same length of time?

A. No, sir. She came to the house and telephoned several times before I met him.

Q. Before you met George Clayton?

A. Yes, sir.

Q. Directing your attention to April 20th, of this year, can you state whether or not you received a long distance telephone call for Shirley Clayton?

A. Yes, sir, I did.

Q. What did you do in connection with that call?

A. I went out and called her. She was just getting in the car and I told her of the call.

Q. Who was getting in the car?

A. Shirley Clayton.

Q. Did those two people live in that house for the period of time you have known them?

A. Yes, sir.

Q. When you called her, did Shirley Clayton or Shirley Doores answer the phone in your home?

A. Yes, sir.

Q. Did you have occasion to hear anything she said? [219]

(Testimony of Esther Setters.)

A. I did not. I had company at that time and I went back in the front room to entertain my company.

Q. Did you have occasion to learn where the call was from?

A. When they called they said some place in Idaho. I didn't get the name of the town that was calling, and after I answered, some man was on the phone, and asked if I would call Shirley Clayton to the telephone.

Mr. Connelly: You may cross-examine.

#### Cross-Examination

By Mr. Smith:

Q. Did Shirley Doores stay there at the house most of the time or were there long periods when she was gone?

A. That I do not know. She several times told me she was going to the hospital and would be gone a few days, and if a telephone message came for her, to leave it at the house.

Q. Do you know, as a matter of fact, she was gone from time to time for extended periods?

A. No, sir; I do not.

Q. You did not neighbor back and forth?

A. No, sir; I did not.

Q. The only connection you had was when—

A. When there were telephone messages, was all.

Q. On this occasion on the 20th of April Shirley Doores came over to the house alone? [220]

A. Yes, sir; she did.

(Testimony of Esther Setters.)

Q. Did you notice whether or not Mr. Clayton waited for her? A. Yes, sir; he did.

Q. Did you see the car leave? A. Yes.

Q. What time of day was that?

A. I would say it was between 1:30 and 2:00. I don't know exactly. I had lunch and it was after that.

Q. Between 1:30 and 2:00 o'clock?

A. I would say about that.

Mr. Smith: That is all.

Mr. Connelly: That is all.

(Witness excused.)

---

### E. H. CAMPBELL,

called as witness by the Plaintiff, first duly sworn, testified as follows:

#### Direct Examination

By Mr. Connelly:

Q. Give your name, please.

A. E. H. Campbell.

Q. Where do you live?

A. At Coeur d'Alene, Idaho.

Q. What is your business?

A. Druggist and pharmacist.

Q. What is the name of the establishment in which you are [221] employed or which you may own—Do you own your own business?

A. No, sir. I work for Hart's Drug Store in Coeur d'Alene.

(Testimony of E. H. Campbell.)

Q. How long have you worked there?

A. Two years and three months.

Q. Are you acquainted with Dr. Teed?

A. Yes, sir.

Q. State whether or not you have filled prescriptions for Dr. Teed.

A. Yes, sir; a good many.

Q. I hand you Plaintiff's Identifications Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16, and ask you to examine them, both on the front and the back, and state whether or not any of them bear your signature.

A. That was filled at the Hart Drug Store (indicating).

Q. Will you first select those filled at the Hart Drug Store? A. Okeh.

Q. Are these the ones filled at the Hart Drug Store?

A. Yes, sir. I suppose they were, yes.

Q. State whether or not you had anything to do with any of the exhibits which you say were filled at the Hart Drug Store.

A. When the druggist fills it he usually puts down the cost of the prescription in code. About the only way I have of identifying them, whether I filled them or not, is the [222] code number which you see on the bottom, and there is some print that looks like I might have put it down there.

Q. Do you know whether or not you put it there?

A. Not for sure, sir.

(Testimony of E. H. Campbell.)

Q. Do you know whether or not you had anything to do with any of these from your examination, or from memory?

A. I think probably I filled some of them, sir.

Q. Have you any recollection of having filled any of them?

A. Those four (indicating), I believe I did.

Q. Why do you say you believe that you did?

A. These marks on the bottom look like they have been written by me. They are not in handwriting. They are printed in letters.

Q. You are referring to Exhibits 4, 5, 7 and 13?

A. Yes, sir.

Q. Now, can you tell us whom you filled them for? A. I filled them for Dr. Teed.

Q. Personally? A. Personally.

Q. And did you deliver, or not, the medicines called for in the prescriptions, to Dr. Teed?

A. That is right.

Q. Now, will you state with reference to each of the four you have referred to, Plaintiff's Exhibits 4, 5, 7 and 13, what price you charged Dr. Teed for each of the pre- [223] scriptions you filled for him?

A. Going back to the one numbered Exhibit 7, the price was three dollars.

Q. That was for how much—what was it for and what quantity?

A. That is written for fifty half-grain morphine tablets. And No. 5, he was charged \$3.10.

(Testimony of E. H. Campbell.)

Q. And what was that for?

A. That is for—

Q. Do you have trouble with the Doctor's writing?

A. Yes, sir. That was filled for 100 quarter-grains of morphine tablets.

Q. What did you charge him for it?

A. Three dollars and ten cents.

Q. Going to the next one.

A. And No. 4 was written for twenty half-grain morphine tablets, and I charged him two dollars.

Q. And the next one?

A. And the next one, No. 13, was written for 100 dilaudid, 1/16th grains, and he was charged six dollars.

Q. Now, referring to Plaintiff's Exhibits 8, 9, 10, 11 and 12, is there anything on them which would indicate whether or not they had been filled at the Hart Drug Store—whether you had anything to do with them or not—whether there is anything there from your system of handling those things so you would know? [224]

A. I think they were, sir.

Q. Is there anything on them that would indicate whether they had been?

A. Going back to the mark in code, it looks like our mark. These are stamped with a numbering machine, that numbers each prescription numerically and successively, and it is filled.

Q. Is it stamped if the prescription is rejected or not filled?

(Testimony of E. H. Campbell.)

A. Yes, sir. It is stamped first. That is the first thing we do.

Q. Whether it is filled or not?

A. Yes, sir.

Q. Is there anything about the cost figure represented here by which you can recognize the writing—Do you recognize the writing of the cost figures?

A. I do not recognize the writing on these.

Mr. Connelly: That is all.

#### Cross Examination

By Mr. Gleeson:

Q. Did you deal with the doctor personally as a clerk, or were you doing the mechanical work of preparing the prescriptions in the back room? [225]

A. No. We waited on the doctor personally at those times.

Q. But you have no particular recollection of these particular times?

A. Nothing definite, other than the lettering on the prescriptions looked like I had filled them, and I remembered that Dr. Teed came in and got them.

Q. Dr. Teed, I presume, has bought morphine tablets there from time to time over a period of years? A. Dr. Teed?

Q. Yes.

A. No. I would say that was a little unusual that the doctor got them.

Q. Do you remember on how many occasions you waited on him personally?

(Testimony of E. H. Campbell.)

A. For that particular thing?

Q. Yes.

A. No; I don't remember exactly. In that group maybe four or five times.

Q. I beg your pardon?

A. About four times.

Q. Are you saying that because you have these four prescriptions in front of you that you did, or do you remember them?

A. They indicate the number of times I think I waited on him.

Q. But other than that, and as far as you are concerned, the [226] printed lettering on the bottom you think might identify them as yours?

A. That is right.

Q. Will you please refer to the printing you told Mr. Connelly about.

A. This printing here (indicating).

Q. What does that mean?

A. These are the cost marks in code and we price each prescription that way.

Q. You all use the same code mark?

A. Yes, sir.

Q. And how many of you are there who fill these prescriptions or were there available to fill prescriptions during the period covered by these prescriptions—that is, apparently from January 24th—No, December 30, 1943, to April 1, 1944?

A. Two people.

Q. What was the other man's name?

A. H. H. Hart.

(Testimony of E. H. Campbell.)

Q. He is the owner? A. Yes, sir.

Q. Does he make similar marks?

A. Yes, sir. He uses the same code, and it is sometimes hard to distinguish between the way he prints and the way I do, but I feel sure I filled those four, and I am not sure [227] about the others.

Q. You think in each of these instances you delivered them to Dr. Teed? A. Yes, sir.

Q. They are made to two or three individuals, or did you notice that? This is Velma Rock. Did you deliver it to Dr. Teed personally?

A. Yes, sir. To my knowledge, I delivered all four of those to Dr. Teed.

Q. To Dr. Teed personally? Do you have any independent recollection of him coming in there on the 30th of December? A. Dr. Teed?

Q. Yes. I mean, do you remember any of these particular dates? A. No, I do not.

Q. Was there anything about the occasion for you to remember other than that Dr. Teed came in personally?

A. Anything that would tie it up?

Q. Yes. A. No.

Q. Did you ever refuse to fill any for Dr. Teed, for narcotics? A. I did not personally.

Q. Did you ever refuse to fill any of his prescriptions for narcotics, whether to him personally or some one else pre- [228] senting them?

A. No, sir; I did not.

(Testimony of E. H. Campbell.)

Q. Do you know this Velma Rock?

A. No, sir.

Q. Whose name appears on the prescription.  
Do you know Mike Sanders whose name appeared  
on this prescription? A. No, sir.

Q. When you take a prescription like that, does  
the individual taking it have to sign for it?

A. No, sir. If it is delivered to the patient  
they do not have to sign for it.

Q. You keep no record, then, of the individuals  
to whom you actually deliver the prescriptions?

A. No, sir.

Q. And there is nothing in your records here  
now before the Court that you have seen, or in the  
drug store itself, where any record is kept of the  
individuals to whom the contents of the prescrip-  
tions are delivered?

A. No. No record but the prescription itself.

Q. Which merely indicates the name of the  
person for whose use it was intended?

A. Yes, sir; that is right.

Mr. Gleeson: That is all.

Mr. Connelly: That is all.

(Witness excused.) [229]

## PERCY M. LANGS,

called as a witness by the Plaintiff, first duly sworn, testified as follows:

## Direct Examination

By Mr. Connelly:

Q. Will you state your name, please.

A. Percy M. Langs.

Q. Where do you live?

A. At Coeur d'Alene, Idaho.

Q. What is your business?

A. I am a druggist.

Q. What is the name of the store that you work in? A. The Rex Drug Store.

Q. Do you own that drug store? A. I do.

Q. How long have you been in business there?

A. As owner and manager for seven years.

Q. Are you acquainted with Dr. E. H. Teed of Coeur d'Alene? A. Yes, sir.

Q. Will you tell us whether or not you have had occasion to fill prescriptions from time to time written to Dr. Teed? A. Yes, sir.

Q. I hand you Plaintiff's Exhibits 1, 2, 3, 6, 15 and 16, and ask you to examine them, and examine them carefully, and tell us whether or not you have seen them before, and whether they have any identifying marks of yourself or your [230] store on them.

A. They are all from that store.

Q. Are there any identifying marks of yours personally on any you recognize as being put on them by any employee of your store?

(Testimony of Percy M. Langs.)

A. All of them are within what we call our serial number, within the date of the number appearing on the prescriptions in the files, and also there are code retail prices.

Q. Your retail prices? A. Yes, sir.

Q. Is that on each of them? A. No, sir.

Q. Will you segregate those which have your code retail price on them and which have not.

A. It is on half of them.

Q. On which does that appear?

A. Those three (indicating).

Q. Exhibits 1, 2 and 3? A. Yes, sir.

Q. And your code retail price does not appear on 6, 15 and 16? A. That is right.

Q. Are you acquainted with Dr. Teed's writing?

A. Yes, sir.

Q. Can you state whether or not those exhibits you have just testified about are in his handwriting? [231] A. I believe they are.

Q. Can you tell us whether or not you yourself filled any of those prescriptions which are before you and the numbers of which I have referred to?

A. These I know for sure (indicating).

Q. That is No. 1 and No. 3? A. Yes, sir.

Q. Have you any recollection of any of the others or any knowledge concerning them?

A. These two (indicating) were filled by one of my registered men.

Q. Do you recognize his writing?

A. This is definitely his writing and the date is on it (Indicating).

(Testimony of Percy M. Langs.)

Q. You are referring, to Exhibits 2 and 6?

A. Yes, sir.

Q. With reference, now, to Exhibits 15 and 16.

A. I cannot tell you definitely who filled those two.

Q. Is there anything indicating they have been filled? A. Yes, sir.

Q. What?

A. The serial number. It is never numbered until the prescription is filled.

Q. That is your rubber stamp number?

A. A numbering machine number. [232]

Q. Can you tell us for whom you may have filled Exhibits 1 and 3?

A. No. 1 was filled for Mrs. Velma Rock, it says here.

Q. Have you any recollection of that? Do you know Velma Rock—have you ever seen her?

A. I have seen her since, but under a different name.

Q. Under what name? A. Shirley Doores.

Q. How about the other one you referred to?

A. I don't know that that prescription was ever picked up by Mike Sanders.

Q. Does it indicate it was filled?

A. Yes, sir.

Q. Now, with reference to those—those are the only two you personally know anything about?

A. I believe so. It is quite possible some of the others may have been referred to me.

(Testimony of Percy M. Langs.)

Q. Is there anything on them to indicate it or have you any recollection?

A. No, sir. There is no way to indicate it.

Q. Have you yourself filled any of the six exhibits before you for Dr. Teed himself—I mean, personally?

A. Do I understand you right—

Q. Whether or not you yourself personally filled any of these prescriptions, any of these six, for Dr. Teed? [233]

A. The prescription is never filled for anyone except for whom it is written. Some other person may have picked up the prescription, but it is never filled for anyone else but for whom it is written.

Q. Have you any recollection of who may have picked up the Mike Sanders prescription, No. 3?

A. I believe Dr. Teed picked it up.

Q. Have you any knowledge whether or not Dr. Teed picked up that or any of the other five exhibits before you?

A. Those that are written to Velma Rock I don't believe Dr. Teed picked any of those up. I believe they were picked up by Miss Doores, or some one for her, but not by Dr. Teed. As to the others, I can't say definitely whether Dr. Teed picked them up or not. I know he picked up more than one.

Q. How many other people in your store filled prescriptions for morphine during the months of January, February, March and April of this year?

A. Probably one; maybe two.

(Testimony of Percy M. Langs.)

Q. Who is the other one that you refer to?

A. J. H. Warrell and J. A. McFetter.

Q. Is Mr. McFetter here?

A. No, sir. He is in Coeur d'Alene.

Q. You referred to your retail price code mark.

Will you indicate that on those which you yourself filled? [234]

A. Yes, sir. This one (indicating).

Q. Referring to No. 3? A. Yes, sir.

Q. Read that. A. 8043.

Q. What does that indicate?

A. The cost was \$1.75.

Q. For what? What does the prescription call for? A. Morphine sulphate, fifty of them.

Q. And the other one where you recognized the price mark?

A. This one is for morphine sulphate, forty.

This is \$3.00. This indicates one thing to me.

Q. What does that indicate?

A. That that was not picked up by a private individual.

Q. But was picked up by whom?

A. By Dr. Teed.

Q. Was there a different price to Dr. Teed than to a customer in the retail trade? A. Yes, sir.

Q. Which was picked up by Dr. Teed?

A. This one (indicating).

Q. Exhibit 3. Do you find any more like that, that were picked up by Dr. Teed, or picked up by some person other than Dr. Teed?

(Testimony of Percy M. Langs.)

A. Frankly, the only way I can explain it, there being no [235] cost code on these two, is the fact that some one other than the person to whom they were made picked them up.

Q. Exhibits 15 and 16? A. Yes, sir.

Q. What does that indicate to your mind?

A. That some one other than Mike Sanders, to whom it was written picked them up, and—

Q. When do you put the cost code on it, when you are dealing with the patient or the customer?

A. That is what I am wondering. I don't know how these got here without a cost code on them.

Q. But those were filled?

A. Yes, sir; they must have been filled.

Q. How about those on which you said you recognized some one else's handwriting? Whose handwriting is it?

A. That was J. H. Warrell's.

Q. And the cost code is on that?

A. Yes, sir; it is on this, but not on this (indicating).

Q. Referring to Exhibit 2, what does it call for?

A. Dilaudid tablets 1/20th grain, twenty of them. The code cost is \$2.25.

Q. And the one which does not carry a cost code, Plaintiff's Exhibit 6, there is a date?

A. Yes, sir.

Q. And that was written by Mr. Warrell? [236]

A. Yes, sir.

Mr. Connelly: You may cross examine.

(Testimony of Percy M. Langs.)

Cross Examination

By Mr. Gleeson:

Q. When you testified regarding this one prescription on which the charge was \$1.75, you did not refer to the number of the exhibit. Can you tell me which that was. Evidently it was 1 or 3.

A. No. 3.

Q. That was \$1.75, and what did it call for?

A. Morphine sulphate hypodermic tablets, half-grain, fifty.

Q. And that was the one to Mike Sanders?

A. That is right.

Q. And that is the one you think Dr. Teed picked up personally?

A. That is my own opinion.

Q. The price indicates it? A. Yes, sir.

Q. Did he get a regular professional discount?

A. Yes; he does. Most doctors do at drug stores.

Q. I am not complaining. What would that have been to the customer?

A. On this same proportion probably about \$3.25 or \$3.50, maybe.

Q. And the other one for three dollars was—Is that Exhibit [237] No. 1? A. No. 1.

Q. And that is for what?

A. Forty of the same morphine sulphate.

Q. One-half grain? A. Yes, sir.

Q. No. 2, there is a price on that?

A. Yes, sir.

Q. And what is the price?

(Testimony of Percy M. Langs.)

- A. Two dollars twenty-five cents.
- Q. Does that indicate a professional discount?
- A. No, sir.
- Q. What does that call for?
- A. Dilaudid, grains 1/20th, twenty tablets.
- Q. And the other one was six. Did that carry a cost price? A. No, it did not.
- Q. And your position is, that was an oversight—That was not your regular practice?
- A. It could have been an oversight or some one other than Velma Rock picked it up. Or Dr. Teed might have picked it up, but I can't understand why those three do not have the cost. That should be indicated.
- Q. No. 6 calls for what?
- A. Morphine sulphate hypodermic tablets half-grain, forty of them. [238]
- Q. And 15, does that have the cost price on it?
- A. It does not.
- Q. What does that call for?
- A. Morphine sulphate half-grain, fifty.
- Q. And 16 has no cost?
- A. No, sir. It was for the same as 15.
- Q. Fifty half-grains? A. Yes, sir.
- Q. Other than the price written on there, do you have any way of indicating whether it was delivered to Dr. Teed or to the individual to whom the prescription was issued? A. I have not.
- Q. You were filling prescriptions over that period between January 1st and May 1st or July, of this year? A. Yes, sir.

(Testimony of Percy M. Langs.)

Q. And you filled other prescriptions under this Mike Sanders name, or is that all you have in the office?

A. I can't tell you definitely. I believe it is.

Q. You did make the selection of these prescriptions yourself from your own files?

A. No, sir. They were made from our files by the drug inspector.

Q. Some Federal Agent?

A. He left a receipt for them and picked them up.

Q. Do you know whether or not that is all the prescriptions [239] you have issued for narcotics to Mike Sanders or Velma Rock?

A. I don't know, but this man seemed to be very thorough in going through the files.

Q. You did not check it yourself?

A. No, sir.

Q. Do you know Mike Sanders?

A. No, sir.

Q. Have you ever seen him?

A. Not to my knowledge.

Q. Did you ever refuse to fill prescriptions issued to him for narcotics?

A. I don't know that I have.

Q. Is it not a fact you did on or about— During the month of April when prescriptions were delivered to you in the name of Mike Sanders by Velma Rock, you refused to fill them?

A. That might be.

Q. Do you recall what reasons you gave?

(Testimony of Percy M. Langs.)

A. Well, frankly, as far as Velma Rock is concerned, I believe that she was more or less typed or spotted among the druggists in Coeur d'Alene as being one who was abusing the use of this drug, and if she brought in one for Mike Sanders or anyone else, we would probably have refused her.

Q. Do you recall she did bring in prescriptions for Mike [240] Sanders?

A. I do not. I do recall turning down prescriptions she brought in. Whether they were made to Mike Sanders or some one else, I do not know.

Q. Do you recall when you turned them down?

A. Sometime during this period. I couldn't tell you exactly.

Q. After you refused to fill prescriptions she brought in, did she attempt to get you to fill prescriptions for narcotics?

A. Personally, I can recall only once of having turned her down.

Q. Did you give her any reason?

A. Yes, sir.

Q. What was the reason?

A. I was out of it.

Q. That was not true?

A. That was not true.

Q. Anyway, she took the hint and didn't come back? A. Not to my knowledge.

Q. Did you examine the prescription, what it called for and who issued it? A. Yes, sir.

(Testimony of Percy M. Langs.)

Q. Do you know it was issued by Dr. Teed?

A. Yes, sir.

Q. Do you recall whether he immediately thereafter came to [241] you with a prescription for narcotics and attempted to have it filled?

A. I don't believe he did after that.

Q. After you turned her down?

A. Yes, sir; that is right.

Q. He did not come back himself. Did he come back thereafter to get prescriptions filled for narcotics at any time?

A. Yes, he picked up these prescriptions for morphine sulphate. I do not know whether they came by his office girl or he brought them in, but I do know he did pick them up.

Q. Do you require some one to sign for them?

A. That is true on some narcotics.

Q. But on these you do not?

A. That is right.

The Court: Narcotics that do not require a prescription you have them sign for it, like luminol?

A. That is not a narcotic, it is a hypnotic. There are some that contain a little codein or morphine, in very small fractions that do not require a prescription, but we are required to keep a written record of those sales.

Q. (By Mr. Gleason) But for these this prescription is the only reference? A. Yes, sir.

Q. You number them as they are filled? [242]

A. Yes, sir.

(Testimony of Percy M. Langs.)

Q. What happens to a prescription you receive which you do not fill? Some stores number the as they receive them and others after they fill them?

A. Yes, sir.

Q. What happens to prescriptions you receive that you do not put your serial number on them?

A. They are not filled. They are turned to the customer. There are certain products that every store does not have. If a man brings in a prescription and we do not have it in stock, that prescription is merely kept there in a place accessible, and we try to obtain the merchandise. If we are unable to we return the prescription to the customer if he wants it.

Q. But it is not stamped with any serial number? A. It is not.

Q. You were the manager of this store?

A. I am the owner of it.

Q. It would be the usual practice, or did you require of this man Warrell or Mr. McFetter that they refer to you for your approval any orders which my be for unusual amounts of narcotics?

A. Generally they do refer them to me.

Q. Were any of these referred to you, Exhibits 15 or 16?

A. I don't remember. I don't know. [243]

Q. Did either of these men refer to you for approval any of the Dr. Teed prescriptions for narcotics issued to either Velma Rock or Mike Sanders during this period?

(Testimony of Percy M. Langs.)

A. Yes, sir; I believe so. I believe about the first prescription that came in for Velma Rock—the date about the first of the year—I believe that was referred to me. No, I filled that. I can't tell you. I don't know.

Q. But you have a recollection some of those were referred to you?

A. Any prescription for narcotics when I am there is always referred to me, when it is for quite a quantity.

Q. What is quite a quantity?

A. Fifty is quite a few in some cases and in others it is not.

Q. The number of prescriptions you have for Mike Sanders for 190 tablets over that period was unusual? A. That is right.

Q. That was called to your attention, was it?

A. Not until after they had gone out. I know in one instance—One man cannot be on shift all the time, and that is why we have registered men to cover both ends of the shift. If I am on shift and I am there, it is referred to me, and if I am not there it is up to the boys to use their own judgment, which they do to the best of their ability.

Q. Is it not a fact you were conscious of the fact that a large number of tablets were being prescribed for Mike [244] Sanders, and that caused you to refuse Shirley Doores or Velma Rock any further prescriptions?

A. I don't think it was that. It may have been.

(Testimony of Percy M. Langs.)

More particularly, as I have before stated, she was typed, and to my knowledge, at least, at the time I recall in particular turning her down she brought in the prescription herself.

Q. Did you discuss with Dr. Teed that you were being called upon to fill a large number of prescriptions for Mike Sanders?

A. Yes, sir; I did.

Q. Did you refuse to fill any more prescriptions for Mike Sanders for him?

A. I do not think it was necessary to refuse. We did not refuse to fill his prescriptions directly to the doctor. There is a limit, and when you get so many it causes you to wonder. We can make money without doing that.

Q. You did discuss it with him?

A. Yes, sir. I showed him the prescription file. I don't know whether there was more or whether this is the quantity. There may be others over there. The files are open and I asked Dr. Teed why there were so many, and he pointed to the reference to syphilitic ulcers, that the man was in a bad shape. With a patient suffering from syphilitic ulcers or canecrs, that is extremely bad, and you will not let them suffer. [245]

Q. After you had this discussion with Dr. Teed did you fill any more prescriptions made out to Mike Sanders for narcotics?

A. That would be guessing again. I don't believe so.

(Testimony of Percy M. Langs.)

Q. You said a moment ago it was not necessary to refuse him. What did you mean by that?

A. You can talk to a man in a manner that—

Q. In that discussion did you tell him you would not fill any more for Mike Sanders?

A. I don't think I told the doctor that.

Q. In any event, you did not, after this discussion? A. That is right.

Q. Do you recall when that discussion was?

A. No, sir.

Q. Have you any way of fixing it?

A. Well, perhaps here are two dates that might help—on Exhibits 15 and 16 are the dates of April 6th and 8th, two that came very close together.

Q. There were fifty tablets on each day?

A. That is right.

Q. In other words, for a man to use 100 tablets in two days it would require some explanation for that?

A. I believe the excuse at that time was as given, that the doctor was going to Granite and he had a call up there and he would take him a supply to last him a while. These [246] were picked up by, I presume, the doctor. I remonstrated about these two coming so close together, and his excuse was, he was going up and the man needed it.

Q. As far as you know, the one on April 8th, that is when you remonstrated with him, and thereafter you never filled any more for Dr. Teed for Mike Sanders?

(Testimony of Percy M. Langs.)

Mr. Gleeson: That is all.

**Examination by the Court**

Q. Are narcotic prescriptions fillable outside the community where they are issued? Is that the practice among druggists?

A. No, sir. My understanding is, a doctor is registered and his registry number is only on file in the state where he resides or practices, and that a prescription written by Dr. Teed could have been filled legally only in Idaho.

Q. But you fill them when they do not involve narcotics? A. Yes, sir.

Q. On each of these prescriptions there is a registry number of the doctor, 1072, as in this case. That is his registry number, for narcotics, as I understand it, and it is granted to him in the state in which he practices, for narcotics? [247]

A. Yes, sir. If the prescription is not for narcotics it could be filled any place, not only in the United States but any place.

**Redirect Examination**

By Mr. Connelly:

Q. You said a numbering machine number indicates the prescriptions were all filled?

A. Yes, sir.

Mr. Connelly: That is all.

(Witness excused.)

M. W. MARKOSON,

called as a witness for the plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Connolly:

Q. What is your name?

A. M. W. Markoson.

Q. Where do you live? A. Coeur d'Alene.

Q. What is your business?

A. I am a pharmacist.

Q. What is the name of your store?

A. The Woodcock Drug Store.

Q. Do you know Dr. E. H. Teed? [248]

A. Yes, sir.

Q. How long have you known him?

A. I have been there two years.

Q. Have you filled any prescriptions for him?

A. Yes, sir.

Q. I will hand you Plaintiff's Exhibit 14 and ask you whether or not you recognize the handwriting on that prescription? A. Yes, sir.

Q. Whose is it? A. Dr. Teed's.

Q. And can you tell us who in your store filled this prescription? A. Yes, sir; I filled it.

Q. And for whom did you fill it?

A. Dr. Teed came in and got it himself.

Q. It is made out to whom?

A. Mike Sanders.

Q. And Dr. Teed came in and got it himself?

A. Yes, sir.

Q. What did you charge him for it?

(Testimony of M. W. Markoson.)

A. Three dollars.

Q. Is there anything to indicate that?

A. Yes, sir, right here (indicating).

Q. The price code? A. Yes, sir. [249]

Q. Three dollars? A. Yes, sir.

Q. And it is for dilaudid, grains 1/20th, tablets 100? A. Yes, sir.

Q. Do you have any numbering machine for stamping prescriptions in your drug store?

A. Yes, sir.

Q. And when do you use the numbering machine, when the prescriptions come in or when they are filled?

A. We number them when we fill them.

Q. Will you state whether or not Exhibit "14" if your number from your numbering machine is on it? A. Yes, sir.

Q. Do you recall any other prescriptions for narcotics for Mike Sanders that were filled by your store during the period December 30, 1943, to April 24, 1944? A. N, sir. That is the only one.

Mr. Connelly: You may cross-examine.

#### Cross Examination

By Mr. Gleeson:

Q. Were any other prescriptions offered to you for filling which you would not take for some reason? A. For him?

Q. Yes. [250] A. No, sir.

Q. For Mike Sanders or for Dr. Teed?

A. No. Mr. Woodcock told me not to fill any more after I filled this one.

(Testimony of M. W. Markoson.)

Q. How long after? A. That same night.

Q. What was the date of that?

A. April 3.

Q. And that night you received orders not to fill any more prescriptions for narcotics for Dr. Teed? A. Yes, sir.

Q. And you did not? A. No, sir.

Q. Were any offered to you? A. No, sir.

Q. Had you filled any for Dr. Teed issued to Mike Sanders prior to this date? A. No, sir.

Q. This is the only one in the files?

A. Yes, sir.

Q. Had you filled any for Dr. Teed for narcotics for any other individual over the period January 1st to May 1st? A. I don't know.

Q. Your orders covered prescriptions issued to Mike Sanders or anybody else? [251]

A. Yes, sir; any narcotics.

The Court: Any narcotic prescriptions for Dr. Teed? A. Yes, sir.

Q. (Mr. Gleeson) You say there is a code price on here? A. Yes, sir.

Q. And that price is how much?

A. Three dollars.

The Court: What is there?

A. RFX.

The Court: What does RFX mean?

A. That is \$3.00.

Q. (Mr. Gleeson) By the way, would this allow Dr. Teed a professional discount?

A. No, sir.

(Testimony of M. W. Markoson.)

Q. This is the regular retail price you charged customers? A. Yes, sir.

Q. Three dollars for these 100 tablets?

A. Yes, sir.

Mr. Gleeson: That is all.

#### Redirect Examination

By Mr. Connelly:

Q. What is dilaudid?

A. It is an opium derivative that they use for pain.

Q. Is that a patent name? [252]

A. That is the name of a drug, dilaudid.

Q. Is there any other narcotic in it than opium?

A. No, sir.

Mr. Connelly: That is all.

#### Re-Cross Examination

By Mr. Gleeson:

Q. How does it compare in strength with these other quarter or half-grains?

A. It would be about the same as the half-grain.

Q. 1/20th is about the same os a half-grain and 1/16th is what?

A. It would be a little stronger.

Q. A little stronger than a half?

A. Yes, sir.

Mr. Gleeson: That is all.

Mr. Connelly: That is all.

(Witness excused.)

## ROY O. BARRY

called as a witness for the Plaintiff, first duly sworn, testified as follows:

## Direct Examination

By Mr. Connelly:

Q. What is your name? A. Roy O. Barry.

[253]

Q. Where do you live?

A. At 1111 North Howell Street.

Q. What is your business?

A. Wholesale druggist.

Q. With what firm?

A. McKesson & Robbins.

Q. How long have you been with that firm?

A. Off and on for thirty-three years.

Q. In what capacity were you employed by them in April of this year?

A. In the sales department.

Q. Will you tell us whether or not on April 24th this year you had a transaction involving the purchase of tablets of morphine with Dr. E. H. Teed of Coeur d'Alene? A. Yes, sir.

Q. Did you personally have that transaction?

A. Yes, sir.

Q. What was that transaction—what did it consist of?

A. It consisted of the purchase of 1000 morphine sulphate tablets, quarter-grain, and 1000 morphine tablets, half-grain, with Federal narcotic blank on Dr. Teed's personal blank.

(Testimony of Roy O. Barry.)

Q. Have you Dr. Teed's personal blank here?

A. I have.

Q. Will you produce it. [254]

A. Yes, sir.

(Hands to counsel.)

Q. Directing your attention to Plaintiff's Exhibit 38, please state generally what it is without reading any name or amount.

A. It is a Federal narcotic requisition for the purchase of narcotics.

Q. And in this instance whose signature does it bear? A. Dr. Teed's.

Q. Is there any of your handwriting on the identification? A. No, sir.

Q. The pencil writing, do you know whose that is?

A. I presume that was made out by the Collector of Internal Revenue when he made application for the blank. They come in a book form with so many blanks to the book.

Q. Is the date of the transaction indicated on the exhibit? A. Yes, sir.

Q. Is the price which you charged Dr. Teed indicated?

A. Not on that. I have it on our order blank.

Q. Will you produce that?

A. Yes, sir (handing to counsel).

Q. What is Plaintiff's Identification No. 39?

A. It is an order form we use to fill an order from in our order department.

(Testimony of Roy O. Barry.)

Q. Who is the purchaser indicated on this exhibit?

A. Wilson's Pharmacy, Coeur d'Alene, Idaho.

[255]

Q. What connection has that with the transaction which you have just testified about?

A. It has been the policy of our wholesale house not to trade directly with the medical profession. However, we are permitted under the law to honor a narcotic blank from the physician and to charge it to the retail drugstore with whom he trades.

Q. Who suggested the name of the Wilson Pharmacy at Coeur d'Alene?

A. I asked him what drugstore he wanted to charge it to, telling him we would not sell to the medical profession wholesale, and he said, "How about the Wilson Pharmacy?" and I said, "That is all right with me."

Q. Where is the Wilson Pharmacy?

A. At Coeur d'Alene.

Q. What was the amount you charged Dr. Teed and what was the quantity you sold him at that time?

A. I make out the order. I do not do the pricing. I wrote this order. The amount is on this invoice here that the pricing department put on it.

Mr. Connelly: I will offer Plaintiff's Exhibits 38 and 39 in evidence.

Mr. Smith: No objection.

The Court: They may be admitted. [256]

(Testimony of Roy O. Barry.)

(Whereupon, McKesson & Robbins Order Blank was admitted in evidence as Plaintiff's Exhibit 39; Federal Narcotic Requisition was admitted in evidence as Plaintiff's Exhibit 38.)

[Printer's Note]: Set out in full at page 71 of original certified transcript.

Q. (Mr. Connelly) Were the narcotics called for in the order form and the invoice delivered to Dr. Teed, or not? A. They were.

Q. In the quantity indicated on the order form? A. Yes, sir.

Mr. Connelly: You may cross-examine.

#### Cross Examination

By Mr. Gleeson:

Q. I notice on the order form it says, "Waiting." That means Dr. Teed was waiting for the delivery? A. Yes, sir.

Q. And they were delivered to him at that time and place? A. Yes, sir.

Mr. Gleeson: That is all.

Mr. Connelly: That is all.

(Witness excused.)

(Ten-minute recess.) [257]

W. G. POOL,

called as a witness for the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Connolly:

Q. Will you state your name.

A. W. G. Pool.

Q. Where are you employed?

A. By the Old National Bank.

Q. In what capacity?

A. Assistant Auditor.

Q. How long have you held that position?

A. About two years.

Q. I will ask you to state whether or not as assistant auditor you have supervision or control of the individual deposit slips of your various depositors?

A. Yes, sir. We have access to them.

Q. In connection with the account of George T. Clayton, will you state whether or not you made a search for all of the deposit slips of that customer, George T. Clayton, between the dates of August 1, 1943, and July 1, 1944. A. I did.

Q. When did you make that search?

A. This morning.

Q. I hand you Plaintiff's Identifications 32 and 33 and a group of deposit slips designated as Plaintiff's Exhibit 36 [258] for identification, and ask you to examine them and state what they are.

A. These are deposit slips representing deposits made at various times during that time.

(Testimony of W. G. Pool.)

Q. To the account of whom?

A. George T. Clayton.

Q. Will you state whether or not those deposit slips before you—the three exhibits, 32, 33 and 36,—represent all of the deposit slips that you were able to find in your bank between the dates indicated, August 1, 1943, and July 1, 1944.

A. Yes, sir. They represent all that I was able to find.

Q. Can you state whether or not they represent all the deposit slips you have any record of in your bank for George T. Clayton between those dates?

A. There was shown on our film a deposit of August 10th of \$250 which I was unable to find.

Q. You were unable to find the slip?

A. A deposit slip similar to these.

Q. But it was shown on your film?

A. Yes, sir; on the monthly statements.

Q. Did you check these before you, Plaintiff's Exhibits 32, 33 and 36, with any other records?

A. The only other record we have is the film taken of the monthly statements. [259]

Q. Did you check these with that?

A. Yes, sir.

Q. And can you state whether or not, with the one exception you have indicated, Plaintiff's Exhibits 32, 33 and 36 represent all of the deposits to the account of George T. Clayton between August 1, 1943, and July 1, 1944?

A. That is right; with that one exception.

(Testimony of W. G. Pool.)

Mr. Connelly: I now offer Plaintiff's Exhibits 32, 33 and 36 in evidence, if the Court please.

Mr. Smith: We renew our objection on the same ground.

The Court: You have no cross-examination?

#### Cross Examination

By Mr. Smith:

Q. The missing deposit slip, for \$250, was for August 10, 1943? A. Yes, sir.

Mr. Smith: That is all the cross-examination.

The Court: The witness may be excused. I understand you have some other testimony to offer of a similar nature, and you will argue the admissibility of them at that time.

Mr. Connelly: Yes, Your Honor.

The Court: You may be excused, Mr. Pool.

(Witness excused.) [260]

Mr. Connelly: The auditor whom I have called is not here, and I will call Miss McHargue.

---

#### NORA McHARGUE,

called as a witness for the Plaintiff, first duly sworn, testified as follows:

#### Direct Examination

By Mr. Connelly:

Q. State your name, please.

A. Nora McHargue.

Q. Where do you live? A. Spokane.

(Testimony of Nora McHargue.)

Q. Where are you employed?

A. The Spokane Valley State Bank.

Q. In what capacity?

A. Bookkeeper and teller.

Q. How long have you held that position?

A. Approximately four years.

Q. I will ask you whether or not you have a record of payments on a real estate mortgage by one Nord to the Spokane Valley State Bank?

A. Yes, sir.

Q. Can you produce it?

A. Yes, sir (handing to counsel).

Q. State generally, without referring to any figures, what Plaintiff's Identification No. 40 is.

[261]

A. This is the liability card of one of our loans made at the bank, and it shows the principal payments and the balance and the dates the payments were made.

Q. What does this particular item refer to on this card, what type of transaction does it refer to?

A. The mortgage payments.

Q. Will you state when the final payment of the balance due on the mortgage indicated was paid? A. May 18, 1944.

Q. And will you state the dates upon which preceding payments to the balance were made?

A. They were made monthly between the 20th and the last of each month.

Q. Are the dates indicated?

A. Yes, sir.

(Testimony of Nora McHargue.)

Q. Will you read the last four or five preceding the final payment.

A. January 29, 1944, March 1, 1944, March 27, 1944, April 25, 1944, and the final payment on May 18th.

Q. What was the amount of the final payment?

A. It is \$1,251.48.

Q. Do not answer this question. I am asking it for the purpose of the record. Who paid the final balance yoou have just referred to on that mortgage?

Mr. Smith: We object. [262]

Mr. Connelly: I wish to make an offer of proof, but for the purposes of the record I will ask another question.

Q. Do not answer this question, either, in order that counsel may have an opportunity to object and the Court may pass upon the admissibility of it. Who made the four payments preceding the final payment as shown on your card?

Mr. Smith: I object to that on the ground that it has no probative force in this case.

The Court: I will have to listen to this argument now. The jury may go to the jury room.

(The jury then retired to the jury room.)

The Court: In the absence of the jury and for the purpose of assisting the Court in passing upon the question of the admissibility of this evidence, I would like to have the witness answer those two questions. Who made the final payment?

A. George Clayton.

(Testimony of Nora McHargue.)

The Court: Who made the previous four pay-  
A. George Clayton.

Q. (Mr. Connelly) Do you see George Clayton  
in the court room? A. Yes, sir.

Q. Do you know him? A. Yes, sir.

Q. Point him out. [263]

A. Sitting over there (indicating defendant).

Mr. Connelly: The Government offers to prove  
that on April 12th—

The Court: How much were these monthly pay-  
ments?

A. Twenty-five dollars.

The Court: Did the mortgage have a final pay-  
ment of \$1200? Was there a final payment due on  
that date?

A. It was a monthly-payemnt mortgage.

The Court: There was no omnibus payment at  
the end of it?

A. No, sir.

Mr. Connelly: The Government has offered to  
prove, if the Court please, that on April 12th, the  
defendant, George Clayton, deposited in the Old  
National Bank \$1000; that on May 1, 1944,—

The Court: One thousand fifty dollars.

Mr. Connelly: Yes. On May 1, 1944, he de-  
posited \$2000. It is our contention that those  
deposits indicate the possession of more money by  
the defendant than his bank account at any other  
time within a substantial period before or after  
the delivery of the money by Dr. Teed to Shirley  
Doores, indicated. That is apparent from the other

(Testimony of Nora McHargue.)

deposit slips. Beginning on August 17th, and Your Honor will recall I asked the witness if he had made a search for deposit slips of the defendant beginning [264] August 1, and he said he did right down through to July, 1944. There were no deposits in August by the defendant until August 17th, when he deposited \$500, and there was no deposit in his bank account after that until September 7, 1943, when he deposited \$225. There was no deposit after that for three weeks until September 29, 1943, when he deposited \$145, and none after that until October 7th when he deposited \$150, and none thereafter until October 20th when he deposited \$256, and none following that until the 17th of November, when he deposited \$200. No other deposits in November, and none in December, until December 8th, when he deposited \$250, and thereafter on December 13th he deposited \$120; none until December 22nd, when he deposited \$88.48, and none after December 22nd until January 21, 1944—it is marked by the bank stamp and pencil, 1944—a deposit of \$100. None after January 21st until February 1st, when he deposited \$442.24, and none after February 1st until February 11th, when he deposited \$259.84, and none after the 11th until February 24th, when he deposited \$120. On February 28th he deposited \$500. None thereafter in the month of March, if the Court please, and none in April until April 12th, when he deposited \$1050, and none thereafter in April until May 1st when he deposited \$2000, and none

(Testimony of Nora McHargue.)

after May 1st, if the Court please, until June 15th, when he deposited nine small items [265] totaling \$89

In connection with Plaintiff's Exhibit 40, and I will discuss them together, because they are under the same rule, and I think one lends force to the other— On May 18th there is a payment of \$1251.48 on the Spokane Valley State Bank mortgage, which later evidence will show, if it should become admissible, and I think it will, was on the home occupied by the defendant and his codefendant, Shirley Doores, which was bought subject to a mortgage given by a Mr. Nord to the bank.

Now, the financial condition of the defendant in the trial of any case involving the unlawful acquisition of money, becomes a material matter. I think that is the general and the broad rule. (Argument.)

The Court: Was this currency used in the payment?

The Witness: Yes, sir.

Mr. Connelly: Yes, the evidence will show it was paid in currency and not out of a bank account.

(Argument by counsel for the plaintiff and counsel for the defendant.)

The Court: I will overrule the objection and the witness may answer, and Plaintiff's Exhibits 31, 32, 33, 36 and 37 may be admitted, and the defendant is allowed an exception to the ruling. Bring in the jury.

(Whereupon, Plaintiff's Exhibits 32, 33, 36 and 37 admitted in evidence.)

(Testimony of Nora McHargue.)

(Plaintiff's exhibit 31 admitted in evidence.)

[Printer's Note]: Set out in full at pages 63-70 of original reporter's transcript. [266]

(The jury then took its place in the jury box.)

Q. (Mr. Connelly) Directing your attention to Plaintiff's Exhibit 40, which has been admitted in evidence—

The Court: No, you did not offer that.

Mr. Connelly: I beg Your Honor's pardon.

Q. Plaintiff's Identification 40, directing your attention to the item under date of 5/18/44, will you state the amount, what the date and the amount indicates.

A. On that date, May 18, 1944, the final payment of \$1251.48 was made on the principal.

Q. Will you tell us who made that payment to you? A. George Clayton.

Q. Do you see George Clayton here?

A. Yes.

Q. Point him out, please.

A. Sitting over there (indicating defendant).

Q. Who made the four preceding payments, preceding the final payment you have just testified about? A. Mr. Clayton.

Q. In what form was this final payment of \$1251.48 made to you? Was it by check or in currency?

A. In currency; in \$100 and \$50 bills.

(Testimony of Nora McHargue.)

Q. Do you have the legal description in the mortgage referred to on the identification?

A. I do not have the legal description of it, but I have the [267] house number on the insurance policy taken out with it.

Q. What is the house number?

A. It is 7225, Carlisle Avenue.

Mr. Connelly: At this time I offer Plaintiff's Exhibit 40 in evidence.

The Court: It may be admitted and an exception allowed.

(Whereupon, Liability Card of Spokane Valley State Bank admitted in evidence as Plaintiff's Exhibit 40.)

[Printer's Note]: Set out in full at page 74 of original reporter's transcript.

Q. (Mr. Connelly) What is the legal description of the property you have given the address of?

A. I do not have it.

Mr. Connelly: You may cross-examine.

#### Cross Examination

By Mr. Smith:

Q. Do you recall how the payments that were made prior to the one on May 18th were made?

A. In currency. Of course, I did not take all of the payments.

Q. All of the payments you ever received on that mortgage were in currency? A. Yes, sir.

Q. Mr. Clayton would come to the bank and make those payments in currency? [268]

(Testimony of Nora McHargue.)

A. Yes, sir.

Mr. Smith: That is all.

Redirect Examination

By Mr. Connelly:

Q. What did you do about releasing the mortgage when this final payment was made?

A. A release of mortgage was made out and it was delivered to Mr. Clayton that day.

The Court: Were the previous payments on the basis of monthly payments? A. Yes, sir.

The Court: And was the \$1251.48 due on May 18th, 1944?

A. No, sir. That was just the balance.

Q. (Mr. Connelly) Do you know how much longer this mortgage had to run on twenty-five dollar monthly payments from May 18th, 1944?

A. I would have to figure it out from the date the note was made.

Mr. Connelly: That is all.

(Witness excused.) [269]

---

JESSE S. BUCHHOLZ,

called as a witness for the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Connelly:

Q. State your name.

A. Jesse S. Buchholz.

(Testimony of Jesse S. Buchholz.)

Q. What official position have you with Spokane County? A. Deputy County Auditor.

Q. As such do you have custody and control of the books and records of deeds and mortgages and mortgage releases? A. Yes, sir.

Q. Have you Volume 505 of Deeds?

A. Yes, sir.

Q. Will you turn to it and open it at Page 503.

A. All right.

Q. Will you state whether or not on that page you have a record of a conveyance of property from one George W. Wesman and wife to George Clayton? A. Yes, sir.

Mr. Smith: May it be understood we have an objection to all of this?

The Court: Yes. The objection that was made goes to all of this testimony without repeating it, and the objection is overruled and an exception allowed to the defendant. [270]

Q. (Mr. Connelly) What is the nature of the instrument that was recorded?

A. A warranty deed.

Q. Read the description.

A. The East fifty-four feet of Tract 6 of the First Addition to Edgerton, as per map thereof recorded in Book "L" of Plats at Page 2 of the Book of Plats, in the office of the County Auditor of said county.

Q. Will you turn to Volume 510 of Deeds at Page 313.

(Testimony of Jesse S. Buchholz.)

Mr. Smith: What is the date of that instrument?

A. The date of the instrument is September 22, 1943.

Q. (Mr. Connelly) Will you turn to Volume 510 of Deeds and to Page 313. State whether or not it reveals a record of a deed for the same property you have referred to in the prior exhibit, the east fifty-six feet of Tract 6 of the First Edger-ton Addition? A. The east fifty-four feet.

Q. Who is the grantor and the grantees?

A. George Clayton is the grantor and the grantees is Shirley Doores.

Q. What type of deed is it?

A. A warranty deed.

Q. And the date of that conveyance?

A. February 4, 1944.

Q. And the consideration named in the deed?

[271]

A. Is \$3000 and one diamond ring. No, one diamond ring valued at \$3000.

Q. Turn to the record of deeds Volume 514, page 3. State whether or not you have a recorded deed on that same property heretofore referred to on Page 3 of Volume 514 of deeds.

A. Yes, sir; the same property.

Q. And who is the grantor?

A. Shirley Doores.

Q. And the grantees?

A. The grantees is George Clayton.

Q. And the date?

(Testimony of Jesse S. Buchholz.)

A. The date is May 8, 1944.

Q. And the consideration?

A. Three thousand dollars.

Q. Will you turn to the book of Mortgages, Volume 503 at Page 442. State whether or not you have a mortgage recorded at that page on the same property heretofore referred to.

A. Yes, sir.

Q. And who is the grantor?

A. Hugo M. Nord and wife.

Q. And who is the mortgagee?

A. The Spokane Valley State Bank.

Q. What is the date of the mortgage? [272]

A. July 31, 1942.

Q. And the amount of the note and mortgage?

A. Represented by one note for the principal sum of \$1750.

Q. Will you turn to whichever volume you have the releases of mortgages in, Volume 512 of that series, at Page 463, and state whether or not you have a release of mortgage, the mortgage you have just referred to in the preceding testimony.

A. Yes, sir.

Q. What is the date of the release of that mortgage?

A. The date of the release is May 18, 1944.

Q. And by whom was it executed?

A. By the Spokane Valley State Bank by C. A. Buckland as its vice-president.

Q. Are all of the books from which you have

(Testimony of Jesse S. Buchholz.)

read official records of the County Auditor of Spokane County? A. They are.

Mr. Connelly: I wish to offer the pages from which she has read in evidence, if the Court please, although I doubt if it is necessary.

The Court: I do not see any necessity of it.

Mr. Connelly: Maybe the rule of the best evidence would require it, but I am willing to stand on the oral testimony.

The Court: You haven't reached that question.

[273]

Mr. Smith: Oh, no, Your Honor. The only objection is the principal objection. We do not ask him to leave the County Auditor's books here. That would not be right.

Mr. Connelly: That is all.

#### Cross Examination

By Mr. Smith:

Q. Will you turn to the first volume, 505, of Deeds. What is the consideration recited in that deed from Wesman to Clayton?

A. One thousand five hundred dollars.

Q. Does it show the consideration was more than \$1,500 from the revenue stamps attached?

A. It shows it was \$1500—\$1.50 state tax and \$1.65 Federal tax—10 cents higher.

Q. Will you state whether or not the volume also shows that the grantee in the deed, George Clayton, was taking it subject to an existing encumbrance of record.

(Testimony of Jesse S. Buchholz.)

A. Subject to encumbrances of record and also subject to assessment for Orchard Avenue Irrigation District and to assessments by Spokane Valley Fire Protection District No. 1.

Q. And does it refer specifically to the mortgage that was on the property by book and page?

A. No, sir. [274]

Q. Now, will you take Volume 503, please, at Page 442. Does that mortgage recite that \$1750 is the total consideration, the total amount?

A. It says, "Represented by one note by the mortgagor to the order of the mortgagee," and then it gives the payments by the month and for the principal sum of \$1750 with interest thereon at the rate of six per cent per annum payable monthly.

Mr. Smith: That is all.

Mr. Connelly: That is all.

(Witness excused.)

---

GEORGE CAMPBELL,

called as a witness for the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Connelly:

Q. What is your name?

A. George Campbell.

Q. What is your business?

A. Pratt's Furniture.

(Testimony of George Campbell.)

Q. State whether or not during the month of April this year you had any transaction involving the sale of furniture with Shirley Doores or Shirley Clayton. A. Yes, sir.

Q. Have you any record of that transaction?

[275]

A. Yes, sir.

Q. What is Plaintiff's Identification No. 41?

A. I was the delivery man in this case.

Q. What did you deliver and to what address?

A. A davenport and a chair.

Q. What was the value of it?

A. Two hundred seventy-nine dollars fifty cents, and the tax.

Q. How was it paid?

A. C.O.D. on delivery.

Q. Who paid it?

A. The Mrs. She turned in an old davenport and chair and paid me \$260 in cash.

Q. A cash or check? A. No, sir, cash.

Mr. Connelly: I offer it in evidence.

Mr. Smith: We object to it as being incompetent, irrelevant and immaterial and not proving or disproving any issue in this case, as far as the defendant is concerned.

The Court: It may be admitted.

(Whereupon, Pratt's Furniture Invoice admitted in evidence as Plaintiff's Exhibit 41.)

[Printer's Note]: Set out in full at page 75 of original reporter's transcript.

(Testimony of George Campbell.)

Q. (Mr. Connelly) On what date was that transaction? A. April 10th.

Q. 1944? [276] A. 1944.

Mr. Connelly: That is all.

Mr. Smith: That is all.

(Witness excused.)

---

WAYNE BEZONA,

called as a witness for the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Connelly:

Q. State your name, please.

A. Wayne Bezona.

Q. What official position do you hold with the United States Government at Spokane?

A. United States Marshal for the Eastern District of Washington.

Q. Did you hold such position in May of this year? A. I did.

Q. Will you state whether or not during the month of May, on or about the 25th or 26th of May, this year, you had occasion to see or take into custody Shirley Doores? A. I did.

Q. Do you recall the date?

A. I don't recall the date of her being taken into custody.

Q. Will you tell us whether or not you recall

(Testimony of Wayne Bezona.)

being in my office with Shirley Doores, or when Shirley Doores was [277] there, about the 26th or 27th of May? A. Yes, sir.

Q. Will you relate what you can remember of the conversation there between Miss Doores and myself—in the first place, how did she happen to be in my office, do you know?

Mr. Smith: At this stage of this case we object to this testimony. It is incompetent, irrelevant and immaterial under the rules.

The Court: On what ground?

Mr. Smith: Any statement or declaration after arrests are not admissible.

The Court: You allege this conspiracy ended on May 25th, and statements by an alleged conspirator made afterwards is only admissible as against the conspirator making it.

Mr. Connelly: I am aware of that rule. I think the rule is properly invoked. Even though I am sure it was on the 25th the lady was in custody and the conspiracy had ended, but I did not ask the question primarily for that purpose. It is only preliminary to show why she was there, but I will not go into any conversation with her, Mr. Bezona.

Q. After you left my office that day—

Mr. Smith: Maybe we can save some time. Judging from counsel's opening statement, certain things were said [278] and certain acts were done, and I think the acts are likewise barred, except against the person performing the act, and Miss

(Testimony of Wayne Bezona.)

Doores having pled guilty, there is nothing before the Court.

Mr. Connelly: My statement was about the recovery of the money.

The Court: I do not understand the rule that way. My understanding of the rule is, statements made during the time of the conspiracy may not be considered by the jury in determining the question of conspiracy, but after they determine a conspiracy has been in existence, then they may consider them as against the defendant. Statements made after the termination of the alleged conspiracy are not admissible except as against the individual making them. Shirley Doores is not now on trial, but I do not understand it goes to the extent of excluding acts after the alleged conspiracy has terminated.

Mr. Gleeson: Unless in the presence of and acquiesced in and not denied by the alleged conspirator sought to be bound.

Mr. Connelly: That is not the rule.

The Court: I do not understand that to be the rule. The rule is a hearsay rule. Ordinarily a statement by one defendant is not binding on another defendant unless in the presence of the defendant on the ground it is hearsay, [279] but in conspiracy there is an exception to that rule which permits the admission of such testimony, but there is no question of hearsay involved in acts.

Mr. Gleeson: Of course, I do not have the rule before me. I can lay my hand on it, but I haven't it right now.

(Testimony of Wayne Bezona.)

The Court: I do not want to make a mistake about it. If you want to argue it I will be glad to hear from you.

Mr. Gleeson: I recognize I might be mistaken, but that is the way I read it and I am positive I am right about it.

The Court: Have you another witness?

Mr. Connelly: One man is on his way here. He is a very short witness.

Mr. Smith: We want to recall Wesley Doores before you rest.

The Court: Recall him now. You can step aside, Mr. Bezona.

(Witness excused.) [280]

---

### WESLEY DOORES

recalled by Defendant for further cross-examination, further testified as follows:

#### Cross Examination

By Mr. Smith:

Q. You are the same Wesley Doores who has heretofore testified in this case? A. I am.

Q. You are a brother of Shirley Doores?

A. That is right.

Q. And likewise a brother of Robert C. Doores?

A. That is right.

Q. Did Ed Kelly give you 100 quarter or half-grain morphine tablets about the 16th of May, or shortly thereafter?

(Testimony of Wesley Doores.)

Mr. Connelly: I object as being repetition. I never asked him that.

Mr. Smith: I withdraw it. I thought you had.

The Court: He testified he only had one shot of morphine since 1941, and that was on the 17th of May.

Mr. Smith: That is right. He got that from Dr. Teed.

The Court: The objection is overruled.

A. No, sir; he didn't give me any morphine.

Q. (Mr. Smith) At any time between that date and the date of your arrest?

A. He did not. [281]

Q. You were arrested on the 25th day of May, were you not?

A. I was arrested on the 4th of June.

Q. And at the time of your arrest you were where? A. In Montana.

Q. How long had you been in Montana at that time?

A. I had been there since about the 29th of May, I believe, or the 28th.

Q. How long prior to that time had you been in Montana?

A. I was over there when my brother died.

Q. When was that?

A. I believe it was along about the 12th of March.

Q. The 12th of March?

A. I could be mistaken. It was in March sometime.

(Testimony of Wesley Doores.)

Q. March, 1944? A. Yes, sir.

Q. And when were you in Montana prior to that time?

A. I never was over there prior to that.

Q. You came to Spokane, I believe you testified, in October, 1943?

A. That is right.

Q. And you remained in Spokane from October, 1943, until sometime in the month of March, 1944, when you went to Montana on account of the death of your brother? A. That is right.

Q. To what place in Montana did you go? [282]

A. Billings.

Q. Did you stay in Billings all the time?

A. I did.

Q. You were not at any other city or town in Montana in March?

A. I never stopped at any. I went through several.

Q. But you did not stop in any? A. No.

Q. That is where your brother lived?

A. Yes, sir.

Q. You were not over there in the month of February at any time? A. No, sir.

Q. Handing you Defendant's Exhibit for Identification "B," I will ask you to examine that and state in whose handwriting it is.

A. That is my handwriting.

Q. After examining that document do you still want to say you were not in Montana on the 2nd of February, the date that bears?

(Testimony of Wesley Doores.)

A. That could have been wrote when I was there in March.

Q. From Manhattan, Montana?

A. Yes, sir.

Q. Were you staying at your brother's house?

A. My brother has no house over there.

Q. Where were you staying when you were there in March? [283]

A. I stayed at the hotel at Billings.

Q. What did you mean, then, when I asked—when you gave your address as 401 North Black Street, Bozeman, Montana, care of Lee Ping?

A. I figured on stopping there.

Q. You thought you would stop there and see Lee Ping on the way back? A. Yes, sir.

Q. Is Lee Ping a gentleman of Chinese ancestry?

Mr. Connelly: I object as not proper cross examination.

The Court: That would be rather obvious.

Q. You say that letter could have been written while you were over there in March, at the time of the death of your brother? A. Yes, sir.

Q. But it is dated February 2nd?

A. I couldn't be too sure it was in March. I would have to look it up. I could look it up and tell you exactly when I was there when he died.

Q. That is the reason you went over there?

A. That is the reason, yes, sir.

Q. How long have you known Lee Ping?

A. Several years.

(Testimony of Wesley Doores.)

Q. What does he do? [284]

A. He is a bartender there.

Q. Is he a Chinaman?

A. He is a white man.

Q. And his name is Lee Ping?

A. That is right.

Mr. Smith: We offer in evidence defendant's Exhibit for Identification "B."

Mr. Connelly: It is objected to as not competent, relevant or material to any issue in this case, and if it is offered for the purpose of impeaching the testimony of the witness as to the date when he was in Montana, I object to it on the ground it is an attempt to impeach on a collateral matter.

Mr. Smith: It is not offered for that purpose. It is offered on another impeaching matter as well.

The Court: What is it?

Mr. Smith: I am speaking in the presence of the jury.

Mr. Connelly: I do not know what you are going to say. I will not give you any free rein to make any statement.

Mr. Smith: I am not trying to take any free rein. That is the reason I said what I did. I can approach the Bench or tell you here.

The Court: Go ahead. [285]

Mr. Smith: This witness testified when he was on the stand before he had certain conversation with the defendant Clayton in Moore's pool room about the first of February; he said the first or second day of February, and it is offered for a

(Testimony of Wesley Doores.)

further purpose. The matter I am referring to is where this witness testified about the first of February he was in Moore's pool hall and Clayton pointed out a tall, dark-completed individual, and said, "That is the fellow I had propositioned to go to Coeur d'Alene, but he wouldn't go, because he didn't have any federal badge and credentials."

Mr. Connelly: I object to the exhibit as improperly identified for the purpose of impeachment or for any purpose.

The Court: Are you sure about the first of February? My notes show January.

Mr. Smith: I am pretty sure of that point, Your Honor.

The Court: It is admissible if he said the first of February.

Mr. Smith: We can ascertain that later from the record, if the Court please. I withhold the offer.

The Court: On the other ground I do not think it is admissible, as it is on a collateral matter.

Mr. Connelly: This witness has not identified this [286] exhibit as to date, but quite to the contrary.

The Court: This is cross-examination, and he said he wrote it, and he has the date of February 2nd on it.

Mr. Connelly: But he said he might have written it in March.

The Court: That will be a question for the jury. I will withhold a ruling until Mr. Ridenour checks his notes.

(Testimony of Wesley Doores.)

Q. (Mr. Smith) After your arrest where were you confined?

A. At the county jail in Butte.

Q. After you were returned to Spokane where were you confined?

A. The county jail in Spokane.

Q. How long were you in the county jail at Spokane?

A. Oh, I believe around four months, or four months and a half.

Q. During that time were you and the defendant, Ed Kelly, in the same cell at any time?

A. I believe I and Ed Kelly were in the same cell the last week I was in jail.

Q. Were you not in the same cell for fifty or sixty days? A. No, sir.

Q. Or in the same cell block? A. No.

Q. Were you not in a cell block situated so you could com- [287] municate with each other by voice? A. No, sir.

Q. But you were together for a week?

A. The last week, yes, sir.

Q. You were called as a witness before the grand jury? A. I was.

Q. And you testified before the grand jury?

A. I did.

Q. And the grand jury returned a not-true bill as to you? A. So the papers said.

Q. That is all you know about it?

Mr. Connelly: The record would be the best evidence.

(Testimony of Wesley Doores.)

Mr. Smith: Have you got the record, Mr. Clerk?

The Court: There is no question about it, is there?

Mr. Connelly: I do not recall a not-true bill against this man.

Mr. Smith: I would like to know whether no bill was returned, or a not-true bill was returned.

The Court: Was he in jail?

Mr. Connelly: Yes, sir.

The Court: The grand jury would have to return a not-true bill when a man is in jail unless they indicted him.

Mr. Connelly: He was in jail, but I cannot say without referring to the record. [288]

The Court: Go in and ask the clerk, and we will not argue about it.

Q. (Mr. Smith) While they are getting the record, you stated, I believe, you had one shot of morphine since 1941, and that was in May when you went up to Coeur d'Alene?

A. That is right.

Q. With this letter signed "Graven"?

A. That is right.

Q. And that letter signed "Graven," do you recall it? A. I don't believe I would.

Mr. Connelly: I object as not proper cross-examination.

Mr. Smith: The letter was not in evidence when he testified before.

Mr. Connelly: He did not testify about it.

The Court: You may ask him.

(Testimony of Wesley Doores.)

Q. (Mr. Smith) Handing you, now, Defendant's Exhibit "A," that is the letter you took to Dr. Teed, is it not?

A. That is right. I believe it is. I couldn't say for sure.

Q. In whose handwriting is it?

A. It looks like Kelly's.

Q. You got Kelly to give you this letter?

A. Yes, sir; I asked him.

Q. You asked him to sign it?

A. He signed it. [289]

Q. Did you tell him what to put in the body of the letter? A. Not that I remember.

Q. Did you go up there on the day the letter bears date— Did you notice the date?

A. I didn't notice the date.

Q. May 24th.

A. I couldn't say for sure about the date.

Q. As you recall now, the letter in question you took up to Dr. Teed was not given an advance date, was it?

A. I don't remember whether it was or not.

Q. What time was it that you were in Dr. Teed's office on the day you presented it to him?

A. I would say sometime around in the afternoon.

Q. Can you give us any better time than sometime in the afternoon?

A. As near as I remember it was in the afternoon.

(Testimony of Wesley Doores.)

Q. Early afternoon, middle afternoon, or late afternoon? A. I couldn't say for sure.

Q. How did you go to Coeur d'Alene?

A. On the bus.

Q. Did you go alone? A. Yes.

Q. Do you remember what time you left Spokane? A. No, I don't.

Q. Can you say whether late in the afternoon or early in [290] the afternoon?

A. It could have been in the morning. I wouldn't say one way or the other, because I don't remember.

Q. Did Dr. Teed ask you if your name was Emory, as indicated in the letter? A. He did.

Q. Did you give him your name as Emory?

A. I did.

Q. How was this shot administered?

A. Hypodermically.

Q. Will you describe what was done?

A. Just like any doctor would give you a hypodermic.

Q. I never had one. Will you state what he did?

A. He puts it in a syringe and gives it to me.

Q. Where did he give it to you?

A. In the arm.

Q. Which arm did he give it to you in?

A. The right arm, I believe.

Q. He inserted the needle up here some place in your right arm (indicating)? A. Yes, sir.

Q. And injected the solution of morphine sulphate in water? A. Yes, sir.

(Testimony of Wesley Doores.)

Q. Do you know how large a dose he gave you?

A. I don't remember. [291]

Q. What did he charge you for it?

A. I don't remember what I did pay him for it, two or three dollars; whatever an office call was.

Q. Did you see him mix it up?

A. No, sir; I didn't see him mix it up.

Q. He went out in another room to mix it up?

A. He mixed it right there, but I didn't pay any attention. I could see him in the other room.

Q. And then he brought it out and inserted the needle in your arm and gave you a shot?

A. Yes, sir.

Q. That was the only shot you had during that period of time? A. Yes, sir.

Mr. Connelly: I object as repetition.

The Court: Overruled.

Q. (Mr. Smith) In 1941, were you a narcotic addict? A. I had used it off and on.

Q. Did you have the habit?

A. At one time, yes.

Q. Where were you living then?

A. Here in town.

Q. What happened in 1941 that you quit using it?

A. Well, I just quit. I couldn't get it, and I took the cure.

Q. And that was when you went down to the penitentiary? A. Yes, sir. [292]

Q. You went to the penitentiary and took the cure?

(Testimony of Wesley Doores.)

A. Yes, sir. I was in the penitentiary and I had to take the cure while I was there.

Q. And you were released by the penitentiary last July? A. July, 1943.

Q. I mean July, 1943. A. That is right.

Mr. Smith: May I read this into the record?

Mr. Connelly: I object to it as not competent, relevant or material to any issue in this case, and not proper cross-examination.

The Court: What is its relevancy?

Mr. Smith: The fact the witness testified before the grand jury and a not-true bill was returned as to him.

Mr. Connelly: I still object to it as having no relevancy.

The Court: I do not think it is relevant.

Q. (Mr. Smith) While you were in jail and before you testified before the grand jury, did you have a document consisting of a statement of your testimony in the case? A. I did not.

Q. You never at any time had such a document?

A. I never did.

Q. Your brother Robert E. Doores is here?

A. Yes, sir. [293]

Q. When did he come to Spokane, do you remember?

A. Oh, a couple of weeks ago, I believe.

Q. Had you sent for him? A. No, sir.

Q. Did you know he was coming?

A. I did not.

(Testimony of Wesley Doores.)

Q. From anything he has said to you, do you know whether anyone else had sent for him?

A. I couldn't say about that.

Q. He has not said anything to you about that?

A. No, sir; he didn't say anything to me about anybody sending for him.

Q. When he came to Spokane where did you see him first?

A. At the hotel where I am staying now, the Pacific Hotel.

Q. Did he stay with you a while?

A. He stayed a couple or three nights with me.

Q. And later did he get a room by himself?

A. Yes, sir.

Q. Did you discuss this case with your brother, Robert? A. Well, no.

Q. No? At any time? While he was staying with you or since he has been here?

A. He tried to discuss it several times, but I wouldn't say nothing about it.

Q. I am going to ask you some questions, Mr. Doores, and I [294] wish you would pay particular attention to the questions. I will ask you to state whether or not during the time that your brother was here you and he talked about this case, and he said to you all he knew about the case was some articles that he had seen in the papers? Did he say that?

Mr. Connelly: I object as being incompetent, irrelevant and immaterial.

(Testimony of Wesley Doores.)

The Court: And not proper cross examination?

Mr. Connelly: Yes.

The Court: I will sustain the objection.

Q. (Mr. Smith) I will ask you to state whether or not your brother, Robert Doores, asked you how George Clayton got mixed up in the case, and just what part in the deal he had, what part he played, and if you did not laugh and state to him that George did not play any part?

Mr. Connelly: That is objected to unless the time and place are stated.

The Court: I will sustain the objection. It is not sufficient in form to lay the grounds for impeachment. In laying the ground work for impeachment you must fix the time, the place and the persons present.

Q. (Mr. Smith) Having in mind the question I just asked you, the time when this statement was made, or these statements or this conversation occurred between you, was within the [295] first three days your brother was here, at the Pacific Hotel, either in your room or his, and that just you and he were present?

Mr. Connelly: I object as too indefinite, and not sufficient information in the question.

The Court: I will sustain the objection.

Mr. Smith: I will have to get further information before I can ask the question.

The Court: Yes. The rule is pretty technical.

Mr. Smith: I will reserve the right to recall him later.

(Testimony of Wesley Doores.)

The Court: Yes. Any questions?

Mr. Connelly: Not at this time.

(Witness excused.) [296]

---

W. P. SOTH,

called as a witness for the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Connelly:

Q. State your name. A. W. P. Soth.

Q. What is your business?

A. I am office manager of the Barton Auto Company.

Q. Do you know Shirley Doores?

A. No, I don't know her.

Q. Did you ever see her?

A. Since I have been here.

Q. Did you have any business transaction with her? A. The company sold her a car.

Q. Did you have anything to do with it?

A. No, sir; I did not.

Q. Did you handle the deal? A. No, sir.

Q. Who did? A. Mr. Heglar.

Mr. Connelly: I have made a mistake, then. That is all.

(Witness excused.) [297]

## GEORGE HEGLER,

called as a witness for the Plaintiff, first duly sworn, testified as follows:

## Direct Examination

By Mr. Connelly:

Q. Please state your name.

A. George Heglar.

Q. What is your position with the Barton Auto Company?

A. Used-car manager and one of the stockholders.

Q. State whether or not you had a transaction in which a car was sold to Shirley Doores.

A. I sold her a car.

Q. When?

A. On the 4th day of May of this year.

Q. What type of car?

A. An Oldsmobile 8, a 78, we call it.

Q. Have you a record of the transaction?

A. I have.

Q. What is Plaintiff's Identification No. 42?

A. That is when the license was transferred to W. E. Doores.

Q. On what date did you have the transaction with her?

A. It was two days before this sheet was made out. That was when she purchased the car. She didn't have any money at that time.

Q. What date was that?

A. That would be the 2nd of May. [298]

Q. Two days before the 2nd of May?

(Testimony of George Hegler.)

A. No, sir; it would be the 2nd of May.

Q. When she bought the car how did she pay for it? A. In \$100 bills.

Q. How much?

A. She paid seventeen \$100 bills and the car was \$1,644.10, and I gave her the change out of the \$100 bill.

Mr. Connelly: You may cross-examine, and I offer Exhibit 42 in evidence.

Mr. Smith: It is subject to the same general objection we have made.

The Court: It may be admitted and an exception allowed.

(Whereupon, Barton Auto Company Invoice admitted in evidence as Plaintiff's Exhibit 42.)

Mr. Connelly: You may cross-examine.

Mr. Smith: That is all.

(Witness excused.)

---

SAMUEL D. SMITH,

was called as a witness for the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Connelly:

Q. What is your name?

A. Samuel D. Smith. [299]

(Testimony of Samuel D. Smith.)

Q. You are a special agent of the Federal Bureau of Investigation? A. I am.

Q. Did you have anything to do with the investigation of this case? A. I have.

Q. Did you have charge of it? A. Yes, sir.

Q. Do you know Shirley Doores? A. I do.

Q. I will ask you to state whether or not you had any conversation with Shirley Doores in reference to her being a married or a single woman?

Mr. Smith: I think the time should be fixed.

Q. (Mr. Connelly) When was this?

A. Well, it was before she was released on bond. That particular day I don't remember. I saw her three or four times from the time she was brought back from Coeur d'Alene until she was released. It was one of the times I talked to her, and she told me—

The Court: No, no. I will sustain the objection.

Mr. Connelly: That is all.

(Witness excused.) [300]

Mr. Connelly: I will call Shirley Doores.

The Court: The jury may retire to the jury room for a minute.

(The jury then retired to the jury room.)

The Court: You may call Shirley Doores now.

## SHIRLEY DOORES

was called, and after being first duly sworn, testified as follows:

The Court: Your name is Shirley Doores, and you are one of the defendants in this case?

Shirley Doores: Yes, sir.

The Court: And you entered a plea of guilty?

Shirley Doores: Yes, sir.

The Court: The government has called you as a witness. I am instructing you that you do not need to testify as to any matter which might involve you in a criminal charge. That does not mean you would have not have a right to testify if you so desire.

Mr. Connelly: I do not intend to ask this witness more than one question.

The Court: What question do you want to ask her?

Mr. Connelly: "Are you married to George Clayton?" I do not intend to go into the merits of the charge. That is the only question I intend to ask her.

The Court: I do not think that would involve her [301] unless you asked if they lived together as husband and wife. Mr. Gleeson, you represent this woman.

Mr. Gleeson: Miss Doores will probably be called as a witness. We are unable to determine that until the conclusion of the government's case. Whether she will or will not, I am not in a position to say. The evidence as it now stands, there has been some inference, at least, by a lady out

(Testimony of Shirley Doores.)

there, who lived as a neighbor, Mr. Connelly attempted to show through her that Miss Doores and Mr. Clayton were living there at the house next door, and he didn't go any further than that. It is the Court's purpose to advise her that she need not testify to any matter that might incriminate her, and you have a right to refuse to testify to that if you desire, or to testify, but particularly you have a right not to testify to anything that might incriminate you in any way. In other words, if you were living with George Clayton as his wife, and were not married to him, that would be evidence of a crime, with which you are not charged, but which might be charged by some other authority or in some other cause, and you need not testify to that unless you see fit.

Shirley Doores: I will ask you what you think I should do.

Mr. Gleeson: I cannot advise you to testify to anything that would incriminate yourself. You will have [302] to do that of your own volition.

Shirley Doores: Would that question be asked me?

Mr. Gleeson: Mr. Connelly is going to ask it.

Shirley Doores: If I was a witness for Clayton would that question be asked me?

Mr. Gleeson: Yes. It is not understood yet whether you will be a witness. I understand you are willing to be a witness, but no demand has been made on you. You are willing, but not request has been made?

(Testimony of Shirley Doores.)

Shirley Doores: Yes.

Mr. Gleeson: I cannot say whether she will testify or not, and I cannot advise her to testify on my own part. It is the admission of a crime for which she might later be charged. It is a matter of little consequence.

Mr. Connelly: I have a different view of that, and I have a different purpose in asking the question.

The Court: The thing I must do is to advise you of your rights, and you can make up your own mind.

Shirley Doores: I would rather leave it that way. I don't understand much about law, and I wouldn't really know.

The Court: You cannot leave it up to Mr. Connelly.

Shirley Doores: I am guilty.

Mr. Gleeson: I cannot so advise you. If you want my advise, I would have to tell you not to testify to [303] anything that might incriminate you, unless you are compelled to do so. You can tell the Court whether or not you intend to follow my advice.

Shirley Doores: If it is not incriminating, I don't see any reason it would hurt to answer the question.

Mr. Gleeson: I am only advising you not to testify to anything that is incriminating.

Shirley Doores: I will not testify, then.

The Court: You will not answer the question?

Shirley Doores: No, not right now.

(Testimony of Shirley Doores.)

The Court: That is the only question that will be asked you. Bring in the jury and ask the question. You can answer that you refuse to testify, on the ground it might tend to incriminate you.

(The jury then took its place in the jury box.)

Direct Examination

By Mr. Connelly:

Q. Your name is Shirley Doores?

A. Yes, sir.

Q. And you are one of the defendants in this case. A. I am.

Q. Have you ever been married to George Clayton, the other defendants? A. No.

Mr. Connelly: No further questions.

Mr. Smith: No questions at this time.

(Witness excused.) [304]

---

W. G. GRABEN,

called as a witness for the plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Connelly:

Q. State your name. A. W. G. Graben.

Q. Where do you live?

A. Seattle, Washington.

Q. What is your business or employment?

A. I am a narcotic inspector of the United States Bureau of Narcotics.

(Testimony of W. G. Graben.)

Q. How long have you held that position?

A. I am on my 20th year.

Q. How long were you located at Seattle in that work?

A. I am on my 11th year.

Q. Did you ever know prior to the occurrence involved in this trial the defendant Shirley Doores?

A. Yes, sir.

Q. Did she know you by name?

A. She did.

Q. Where and when was that?

A. I think I have known her for perhaps six or seven years. She always referred to me with the letter "V" instead of the letter "B."

Q. As Graven? [305] A. Yes, sir.

Q. When she spoke to you? A. Yes, sir.

Q. Is there a Mr. Bangs in your department?

A. Bangs was District Supervisor until about a month ago when he was transferred to Denver.

Mr. Connelly: That is all. You may cross-examine.

Mr. Smith: No questions.

The Court: The jury may be excused until 1:15 o'clock tomorrow afternoon.

(Whereupon an adjournment was taken until the hour of 1:15 o'clock p. m., December 8, 1944, at which time all parties being present as heretofore, including all the jury, the trial was resumed as follows, to-wit:)

Mr. Smith: In connection with the offer in evi-

(Testimony of W. G. Graben.)

dence of Defendant's Exhibit B, I have the reporter's transcript, (handing to the Court).

The Court: I think I will let you put it in in view of the conversation that ensued yesterday.

Mr. Smith: May I read both of them to the jury, then, at this time?

The Court: Yes.

(Whereupon, Extracts of Testimony admitted in evidence as Defendant's Exhibit B, and read to the jury by Mr. Smith.)

[Printer's Note]: Set out in full at page 81 of original reporter's transcript.

Mr. Smith: Does Your Honor want the testimony attached to the exhibit?

The Court: I do not think it is necessary.

Mr. Smith: It is quite all right.

The Court: All right; attach it.

Mr. Smith: I would like to have Bunny Doores recalled. [307]

---

### WESLEY DOORES

recalled as a witness for the Plaintiff, further testified as follows:

#### Cross Examination

By Mr. Smith:

Q. You are the same Wesley Doores who has testified in this case? A. I am.

Q. What room did you occupy in the Pacific Hotel in the month of November, 1944?

(Testimony of Wesley Doores.)

A. 451, I believe, or 452.

Q. Specifically, about the 18th of November what room did you occupy.

A. Well, I didn't really occupy any. Clayton had that room rented under his name.

Q. The room was what number?

A. 451 or 2, I am not sure.

Q. Are you sure it was not 248?

A. Of this year?

Q. Of November, this year.

A. Oh, yes; this year.

Q. I am not talking about last year.

A. Yes, sir; this year.

Q. Your room was 248?

A. That is right.

Q. Do you recall the time when your brother, Robert Doores, [308] came to your room?

A. I do, yes.

Q. And what day was that?

A. Well, I couldn't say for sure what day it was.

Q. Would November 18, 1944, be approximately the date?

A. It could be around there, I guess.

Q. What time of day did he come?

A. He come around 12:00 or 1:00 o'clock the night he come the first time.

Q. Do you know whether or not he tried to get a room in the hotel and he could not get a room because they were full? A. That is right.

Q. Did you ask him to stay with you that night?

(Testimony of Wesley Doores.)

A. I did.

Q. Did he stay with you in room 248?

A. He did.

Q. Had you been at work that afternoon or evening? A. Yes, sir.

Q. What shift were you working?

A. I was working the swing shift, 2:48 to 10:48.

Q. After he came did you and he go out and get something to eat?

A. I believe we did. I couldn't say for sure.

Q. After you came back you and he went to bed together? In your room 248? [309]

A. Yes, sir.

Q. And that was in the early morning of November 18th?

A. I couldn't be sure about the date.

Q. But at any rate, it was early in the morning the first time you saw him after he came here?

A. Yes, sir.

Q. I will ask you at that time and place after you and he had returned to room 248 and were together in the room with no one else present, if the following conversation, in substance and effect, did not occur, between you and your brother Robert E. Doores: that he asked you, or that you started discussing this case, and that he told you he was interested in the case because of the fact that his sister Shirley was mixed up in it, and you were mixed up in it, and in the conversation he asked you what part in the case George Clayton had played, and what he was supposed to have

(Testimony of Wesley Doores.)

done, or how-come he was in the trouble, and you laughed when he asked you that, and told him that Clayton did not have any part in the case at all; that you and Kelly were framing Clayton?

A. No, sir. We did not have no conversation like that at all.

Q. And in the same conversation, at the same time and place, between you, that if you did not state to him that if Shirley had to go to the penitentiary on this deal [310] Clayton might as well go with her, and that he said to you, at the time you made that statement, in substance and effect, "Well, Bunny, that doesn't seem right to me," and you said in substance and effect, "Well, I think that George kept Kelly and me from getting our split in this deal, and that is one reason we are framing him, and another reason is, I don't like him." Did you say that?

A. No, sir. There was no conversation like that whatsoever.

Q. That in the same conversation if the following was not stated to your brother by you "I have to go up there to appear in court. After this double crossing has been done, and I don't know how to keep from appearing up there. If I had the money I would leave the country"?

A. There was no conversation like that.

Q. Then finally you said to him, "How much money have you got?" and he said, "Well, I have a little with me," and you said, "Well, do you have enough with you so you could loan me \$100?"

(Testimony of Wesley Doores.)

and he said to you, "What do you want with it?" and you said, "I would buy a railroad ticket just as far as I could go. That would be one way of keeping from appearing up there, and I would be glad." Did that occur?

A. No, sir; that did not occur.

Q. Didn't he tell you he did not have enough money at that time to let you have \$100, and still be able to finish, [311] or have enough to finish his trip at home?

A. I don't remember no conversation like that.

Q. And in that conversation didn't you further state that one reason you wanted to get out of here and leave was because you were afraid you would be sent back to Walla Walla?

A. No, sir; that is a lie there.

Q. I will ask you if on the morning of the 20th of November at about 10:00 o'clock, if you did not ask, at the Pacific Hotel—Oh, yes, on the morning of the 20th of November, 1944, if you did not go down to the Turf on Main Avenue, and while you were sitting there with him and drinking coffee, if you did not ask him to run you out to George's place? A. I did not.

Q. And he agreed to do it?

A. He never took me out to George's place.

Q. And you and he got in the car and drove out to George's house on East Carlisle, arriving there about 11:00 o'clock? A. No.

Q. I will ask you further if you and he did

(Testimony of Wesley Doores.)

not get out of the car and go to the door and knock, and George hollered for you to come in, and when you went in he was lying on a couch, because his leg was hurting him, and as soon as you walked in George said to you, "What do you want here, [312] Bunny?" A. No.

Q. And you said, "I have come out to talk to you, George," and George said, "I don't want to talk to you," and you said "Now, George, I am sorry everything has happened as it has and I am trying to get you squared off, if you will let me talk to you long enough to explain it."?

A. That is not so.

Q. And you asked George for a loan of money and stated you would leave, is that correct?

A. I did not, no.

Q. And because you knew you and Kelly were framing him?

Mr. Connelly: Is that your question, that he said that?

Mr. Smith: Yes.

A. I never was out to see George at all.

Q. You never went out there at all?

A. No.

Q. And you stated to him, "If you will loan me enough money to leave I will guarantee you I will not be here for any trial to appear against you"?

A. No.

Q. And George said to you, "I wouldn't loan you a nickle; I wouldn't give you anything. Get out

(Testimony of Wesley Doores.)

of my house"? Is that true? "Get out of my house and stay out"? [313]

A. I never was out there.

Q. And following that you came back to town in your brother's car, and as you were coming back to town you were sore because George wouldn't talk to you, and you said to your brother, "That is all right. I will get even with him when we go into that court room" or "if I go into that court room"? Is that true?

A. That is not true.

Q. And you further stated, "And if the lawyer starts cross-examining me about narcotics or if I use dope I will tell him all the dope I used or bought I got from George Clayton"? A. No.

Q. I will ask you further if the night before your brother—

The Court: That was the 19th?

Mr. Smith: The 19th.

Q. At about 7:00 o'clock, in the hotel room, that you and your brother were not talking about the case—or you were talking about it—and your brother stated to you that he felt sorry for all of you, to be mixed up in a deal like that, and it looked bad, and he stated to you, "Bunny, I can't figure out for the life of me how George got mixed up in this. He must have had something to do with it, or he would not be mixed up," and you said, "He didn't have anything to do with it at all. When they came [314] out to pinch him he didn't know

(Testimony of Wesley Doores.)  
what he was being pinched for." Was that statement made?

A. No, sir; it was never made by me.

The Court: Where were you when George Clayton was arrested?

A. I wasn't here at that time. I think I had left that day or the day before.

Mr. Smith: That is all.

#### Redirect Examination

By Mr. Connelly:

Q. Were you in Spokane when Clayton was arrested?

A. I couldn't say for sure now, whether I was, or not.

Mr. Smith: May I ask one further question?

Mr. Connelly: Yes.

Q. (By Mr. Smith): Didn't you testify in one of your previous examinations you left Spokane on the 29th of May?

A. I left somewhere around the 29th. I don't know whether it was right on the 29th or not.

Q. (Mr. Smith): You were in town three or four days after your sister and George Clayton had been arrested, and Kelly?

A. I think the day I left town I read in the paper where Shirley was arrested, but I don't remember reading where George was arrested, and I couldn't say for sure whether [315] he was arrested at that time or not.

Mr. Smith: That is all.

(Testimony of Wesley Doores.)

Q. (Mr. Connelly, resuming): When did you leave town?

A. I believe it was around the 29th—28th or 29th.

Q. And you went to Montana?

A. Yes, sir.

Q. How long were you away from Spokane before you were arrested in Montana?

A. From the time I left, I was arrested on the 4th of June in Montana, and that would be around six or seven or eight days, I believe.

Q. And after you were arrested in Montana were you kept in jail?

A. I was, yes, sir; at Butte, Montana.

Q. Was Clayton with you in Montana—was he arrested with you in Montana?

A. No, sir; he was not.

Q. You left here alone, did you not?

A. Yes, I did.

Q. If Mr. Clayton was arrested on June 2nd, were you in Spokane on that day?

A. No, sir.

Q. Had you had any correspondence with your brother, Robert, before he came here on whatever date it may have been in November? [316]

A. No, sir; I did not.

Q. Had you informed him in any way you were living at the Pacific Hotel through the month of November? A. No, sir; I hadn't.

Q. Did your sister, as far as you know, know you were living at the Pacific Hotel at that time?

(Testimony of Wesley Doores.)

A. He told me when he came in town that night he had read a letter I had wrote my sister in Montana and it had the return address on it where I was living.

Q. When had you last seen your brother prior to this occasion in November?

A. Oh, I would say it was February or March.

Q. Of this year? A. Yes.

Q. And where was that?

A. That was in Montana.

Q. How long did your brother occupy your room with you after he came here in November?

A. I would say two or three nights. I believe it was three nights.

Q. And then he got a room of his own?

A. Yes, sir.

Q. Can you tell us whether you or your brother first started talking about this case?

A. Well, he started talking about it first and wanted to [317] know about it. I didn't say anything whatever about it to him.

Q. Can you tell the court and jury what he said to you during the time he was talking to you about it, and tell the court and jury all the things he said to you?

A. Well, when we was talking in my room one night, oh, it was—I would say the 29th or 30th of November—

The Court: Ten days after he came here?

A. Yes, sir. About ten days after he came. And he asked me at that time if—He asked what I thought Shirley would get out of it—that is our

(Testimony of Wesley Doores.)

sister—and I told him I didn't know, and he told me at that time if I would leave town I could make it easier on her and Clayton by not appearing in this trial, and he told me, "I have got a car, and I am going to Boise, Idaho, and I will haul you as far as Boise, Idaho, if you will leave" and he said, "I can get the money for you to go on east" and he said, "You won't be here to appear at this trial," and I said no, I absolutely wouldn't leave.

Q. Are you still on parole from the Washington State Penitentiary? A. I am.

Q. Was anything further said by your brother than you have just told us in connection with your leaving?

A. That is about all I can recall right now that was said then. [318]

The Court: How much pay do you get out where you work?

A. Eighty-five cents an hour.

The Court: How much is that a week?

A. That amounts to—My pay runs around thirty-four and thirty-five dollars a week. I put in over-time some.

The Court: When do you get paid?

A. On a Friday.

Q. (Mr. Connelly resuming): There was some reference in the cross examination yesterday to your getting injections of morphine from Dr. Teed. Can you tell us why, or what reason you had for going up there to get an injection of morphine?

(Testimony of Wesley Doores.)

A. Well, I had been drinking here a couple of weeks, and I was sick, and I went up there to get a shot to straighten up on, more than anything. That is what the biggest part of the doctors give it to you for, is being drunk and nervous and sick.

Q. Did you ever get any morphine from Kelly?

A. I never did get any from Kelly.

Mr. Connelly: That is all.

#### Recross Examination

By Mr. Smith:

Q. You say you had been drunk for two weeks before May 24th? [319]

A. I was drinking, yes, sir, off and on.

Q. To such an extent that you were sick and ill and nervous and thought a shot of drugs would help you? A. That is right.

Q. How many days a week do you work at the aluminum plant?

A. I work six and seven days a week.

Q. Have you put in a full shift up until the time you were called to attend this trial?

A. I had, yes, sir.

Q. Every week?

A. You mean put in a full day every day?

Q. Put in a full weekly shift working every day?

A. I don't know if I have or not. I have missed two or three or four days. If you don't get the bus right on time you don't get out there.

Q. When did you go to work at the aluminum plant?

(Testimony of Wesley Doores.)

A. I have been there about six weeks, I believe — five weeks or six weeks.

Q. And you want us to understand you have worked six to seven days a week during all that time with the exception of two or three or four days you might have missed?

A. That is right.

Q. In this conversation with your brother Robert which occurred the 29th or 30th, where was that?

A. That was at the Pacific Hotel. [320]

Q. Was your brother Robert staying at the Pacific Hotel at that time?

A. I don't know if he was or not. He called me and came up to my room. I don't know whether he had checked out at that time or not.

Q. At that time you want us to understand he told you that you had better get out of town and offered to assist you? A. That is right.

Q. There was no one present at that conversation except you and he? A. Just him and I.

Mr. Smith: That is all.

#### Redirect Examination

By Mr. Connelly:

Q. One other question. Will you state whether or not you made a statement to Mr. Jensen and Mr. Lamb of the FBI concerning the facts of this case, on August 5, 1944? A. I did.

Q. And did you sign that statement?

A. I did.

(Testimony of Wesley Doores.)

Q. Have you had occasion to see it or read from it since that time?

A. I believe I have seen it a couple or three times, and I believe I went over it with you one day. Or you asked [321] me a few things concerning it.

Q. Directing your attention to Plaintiff's Identification 43, I will ask you to state whether or not this is the statement you gave and which you signed for Mr. Jensen and Mr. Lamb on August 5th?

A. That is the statement I signed.

Mr. Connelly: I offer Plaintiff's Identification 43 in evidence.

Mr. Smith: Then I want to read the entire statement at this time, Your Honor. There are several pages.

The Court: Are you going to object to it?

Mr. Smith: Yes.

The Court: I will sustain the objection. You do not need to read it.

Mr. Connelly: I offered it in view of the cross-examination of the witness as to a purported conversation as to what he said he was going to do with Clayton when he got on the stand in court, which is supposed to have been made on the 20th of November to his brother.

The Court: How could his statement be material?

Mr. Connelly: Because it is consistent with the statements he has made here on the stand on direct and cross-examination.

(Testimony of Wesley Doores.)

Mr. Smith: I object to the statement of counsel.

The Court: I will sustain the objection to the offer.

Mr. Connelly: That is all.

(Witness excused.) [322]

---

JOHN F. HOBBS,

called as a witness for the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Connelly:

Q. What is your name?

A. John F. Hobbs.

Q. And where are you employed?

A. At the Old National Bank.

Q. In what capacity?

A. As vault manager in the safe deposit vaults.

Q. How long have you held that position?

A. About twenty-two years.

A. I will ask you to state whether or not you have with you the bank's records of the rental of a safe deposit box to Vera Wilson?

A. Yes, sir; I have. Here is a list of all the admissions to the box (handing to counsel).

Q. Have you the original signature card?

A. Yes, sir.

Q. What is Plaintiff's Exhibit 44 for identification? A. What is the question?

(Testimony of John F. Hobbs.)

Q. Tell us generally what Plaintiff's Exhibit 44 for Identification is.

A. On these cards we have——

Mr. Smith: Just a minute. The answer is not [323] responsive.

A. We have a contract card here of the rental of this particular safety deposit box.

Q. (Mr. Connelly) What box is it?

A. This is in the "D" section, D-868.

Q. And what is the name of the renter?

A. The contract was opened by——

Mr. Smith: We object to that until it has been admitted. I don't know what it is.

The Court: He has answered the question.

Mr. Smith: Vera Wilson?

The Court: Yes. I will sustain the objection on the ground it is repetitious.

Q. (Mr. Connelly) I will ask you to state whether or not you see Vera Wilson in the court room.

A. Yes, sir. I see the lady sitting over there with the hat on with the green——

Q. You are pointing to the lady, Shirley Doores, a defendant in this case?

A. Well, as I have her record, it is Vera Wilson.

Q. You are indicating— You mean this lady here (indicating)? A. Yes, sir; that is the one.

Q. Did she sign the Identification 44?

A. Yes, sir. We have her signature here.

Q. Does the identification show the date when the contract [324] was entered into?

(Testimony of John F. Hobbs.)

A. Yes, sir; on the reverse side.

Q. Will you state what Plaintiff's Identification 45 is, which consists of all of these slips—generally?

A. Every time a customer comes in the vault and has access to it, we ask them to sign an entrance slip, as we call it, and they sign it, and also with the box number, and we have their signature card to verify it again, and it is stamped with the month, date and the year, to give us a pretty complete record of the exact times they have had access.

Q. Are these permanent records?

A. They are my original records.

Mr. Connelly: I offer Plaintiff's Identifications 44 and 45 in evidence.

Mr. Smith: To which we object as being incompetent, irrelevant and immaterial, and that particularly the last two items attached to Exhibit for Identification 45 are not admissible because they are subsequent to the date alleged in the Information.

The Court: They may be admitted and an exception allowed.

(Whereupon Old National Bank Safe Deposit Records admitted in evidence as Plaintiff's Exhibits 44 and 45.)

[Printer's Note]: Set out in full at pages 76-77 of original reporter's transcript. [325]

Q. (Mr. Connelly) Is it indicated on Exhibit 44 when the contract ended?

(Testimony of John F. Hobbs.)

A. Yes, sir; it is right there (indicating)—on August 4, 1944.

Q. Will you state whether or not you were present when the United States Marshal came to the bank and this box was opened?

A. Yes, sir; I was.

Mr. Smith: That is objected to as incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

Q. (Mr. Connelly) And were you present when anything was taken from the box on that date, in the Marshal's presence? A. Yes, sir.

Q. Do you know what was taken from the box on that date?

Mr. Smith: That is objected to as being an act after the matter was ended, and not in furtherance of any alleged conspiracy.

The Court: The objection is overruled.

Mr. Smith: May we have an exception to the ruling?

The Court: Exception is allowed.

Q. (Mr. Connelly) You may answer.

A. Yes, sir; it was currency.

Q. Do you know how much?

A. I couldn't say offhand, but they have a record of it down [326] there.

Q. Have you the record here? A. No, sir.

Q. Did you see the currency? A. Yes, sir.

Q. Was there more than one bill?

A. Yes, sir; there were several—something

(Testimony of John F. Hobbs.)

around \$9000, but the exact figure I couldn't tell you.

Q. In currency? A. Yes, sir.

Mr. Connally: You may cross-examine.

### Cross Examination

By Mr. Smith:

Q. This box was cancelled August 4th?

A. Yes, sir.

Q. And I noticed you transferred this box to another safe depositor in your bank?

A. Yes, sir. It was transferred.

Q. Do you know when it was transferred?

A. I have that record, yes, sir. I didn't bring that record with me.

Q. Do your records show when the Marshal went in the bank? A. Yes, sir.

Q. When was that? [327]

A. It was on the—I made this record on this card, but we had a complete typewritten record in the bank. The record is on the safe deposit box and I made that myself. Is that the 29th, it is dated there—May 29th?

Mr. Smith: I will have this marked for identification.

(Whereupon, Defendants' Exhibit C was marked for identification.)

Q. Defendants' Exhibit C is a record of when this box was first attached or sequestered by the Marshall, is that correct? A. Yes, sir.

Mr. Smith: That is all, Mr. Hobbs.

(Testimony of John F. Hobbs.)

Redirect Examination

By Mr. Connelly:

Q. What is there on the record that shows the box was attached?

A. The record that we have in the bank was, there was a search warrant. There was no restraining order or attaching, or anything of that kind.

Q. There was no attachment?

A. No. The box was immediately released after the Marshal was there and they satisfied themselves and took what they wanted and they released the box to the customer. [328]

Q. Have you any record of the amount of money that was taken from the box?

A. The bank has the record.

Q. But you haven't it in your department?

A. No, sir.

Q. What man at the bank has that record?

A. Mr. Erickson would have it, the Assistant Cashier, or Mr. McWilliams, the Assistant Vice-president and Cashier.

Mr. Connelly: That is all.

Mr. Smith: That is all.

(Witness excused.)

WAYNE BEZONA,

recalled as a witness by the Plaintiff, further testified as follows:

Direct Examination

By Mr. Connelly:

Q. You are the same Wayne Bezona who was on the stand yesterday evening? A. Yes, sir.

Q. And you are the United States Marshal for the Eastern District of Washington?

A. Yes, sir.

Q. I will ask you to state whether or not on May 29th of this year you had occasion to go to the Old National Bank Safe Deposit Department?

A. I did. [329]

Q. And with reference to Box "D"-868, which was in the name of Vera Wilson, will you state whether or not you were present when that box was opened. A. I was.

Mr. Smith: May it be understood we have an objection to all this line of testimony?

The Court: Yes; your objection will go to all this testimony. I am overruling the objection.

Q. (Mr. Connelly) When the box was opened can you state whether or not in your presence any money was taken from it? A. I can.

Q. And was that money turned over to you?

A. It was.

Q. Have you it with you?

A. No; I don't have the money.

Q. Where is it?

(Testimony of Wayne Bezona.)

A. It is in a safe deposit vault in the Old National Bank in my custody.

Q. How long would it take you to produce it here?

A. The time it would take to go down to the bank and back, I guess.

Q. Do you know the amount of the money?

A. I do.

Q. How much was it? [330]

A. It was \$5,950.

Q. Can you tell us in what form that money was? A. It was in currency.

Q. Did you make any list of the denominations of the currency? A. I did.

Q. Have you that list? A. I do.

Q. Where is it?

A. I have it in my pocket (producing paper which was marked Plaintiff's Exhibit 46 for identification).

Q. I hand you Plaintiff's Exhibit for Identification 46, and ask you to state the contents generally. State what it refers to.

A. Well, it contains the amount of money stated, and these bills were in fifty dollar denominations, I believe, and they are all numbered here. There was quite a list of them.

Q. I do not want you to read from it. Did you yourself take any part either in the preparation of the list or in checking the bills you have referred to with the list? A. I did.

Q. Were they the same or not?

(Testimony of Wayne Bezona.)

A. They are the same.

Q. Does that constitute all the money you have referred to, this list? A. Yes, sir. [331]

Mr. Connelly: I offer Plaintiff's Identification 46 in evidence, and I am going to request the Marshal to produce the best evidence, if the Court will permit it—that is, the money itself.

Mr. Smith: Subject to the same objection we have made.

The Court: You do not object to it because it is not the best evidence?

Mr. Smith: No. I am not asking that he bring the money here.

The Court: I do not see any reason why he should bring \$5,950 in bills here.

Mr. Smith: We are not asking that he do that.

The Court: I will admit it, subject to the objection, but it is not the best evidence.

(Whereupon, List of Bills taken from Safe Deposit Box admitted in evidence as Plaintiff's Exhibit 46.)

[Printer's Note]: Set out in full at page 79 of original reporter's transcript.

Mr. Connelly: You may examine.

Mr. Smith: No questions.

(Witness excused.)

Mr. Connelly: The Government rests.

The Court: The jury will retire to the jury room.

(Whereupon, the jury retired to the jury room.)

(Testimony of Wayne Bezona.)

Mr. Connelly There is one matter I completely overlooked.

Mr. Smith: And I would like to have Mr. Kelly [332] recalled.

Mr. Connelly: In fact, I overlooked having the jury see some of these exhibits, but they could see them later.

The Court: Bring in the jury.

(The jury then took its place in the jury box.)

---

R. D. KELLMER,

called as a witness for the Plaintiff, first duly sworn, testified as follows:

The Court: After you went out both lawyers decided there was something they had overlooked.

Direct Examination

By Mr. Connelly:

Q. State your name. A. R. D. Kellmer.

Q. Where do you live, Mr. Kellmer?

A. At Veradale, Route 1.

Q. Where do you work?

A. The First National Bank.

Q. In what capacity.

A. I am paying and receiving teller, but as of today I took the custodian's job in the vault, as the manager was sick.

Q. Of the Safe Deposit Boxes?

A. That is right.

(Testimony of R. D. Kellmer.)

Q. Will you state what Plaintiff's Identification 47 is, con- [333] consisting of three cards.

The Court: Just tell us what those cards are.

A. The first is a file card and the second is a signature card and the other is the contract for the rental of the box.

Q. (Mr. Connelly) And is the date the contract was entered into here on the contract?

A. Yes, sir; it was October 19, 1943.

Q. And the name of the renter, of course, appears, does it not? A. It does appear.

Q. And where is the signature on the card?

A. The signature of the renter is here (indicating).

Mr. Connelly: I offer Plaintiff's Identification 47 in evidence.

Mr. Smith: We make the same objection we have made to the other exhibits of like character.

The Court: I think it should be sustained—October 19, 1943. Does the date of the termination of the contract appear there? A. Yes, sir.

The Court: Where is it?

A. Right here (indicating).

The Court: That is when it was terminated?

A. That is when we rented her the box.

The Court: But when did it end?

A. It has not expired yet that I know of. [334]

The Court: I will sustain the objection.

Mr. Connelly: I would like to be heard on it, if Your Honor please. There is one point that--it

(Testimony of R. D. Kellmer.)

would not be proper to discuss it in the presence of the jury.

The Court: All right. You may go to the jury room.

(The jury then retired to the jury room.)

Mr. Connelly: The charge here is conspiracy. The purpose of the first exhibit from the Old National Bank of course was to show that Shirley Doores had rented a box and put money in the box. She rented the box on April 24, 1944. That is the date upon which Dr. Teed completed the payment of \$6,500. He had paid \$3000 on Saturday, the 22nd, and \$3500 on Monday, the 24th. At the same time Shirley Doores had a safe deposit box in the First National Bank under her own name. The purpose of renting a second box under an assumed or fictitious name becomes apparent when it is considered she already had this box in the First National Bank. She is living with this defendant whom the evidence shows was a party to this conspiracy. That is the purpose I offered it for. No money came out of this box that we intend to offer. We want to show that she had a box in her own name in another bank.

The Court: I will sustain the objection. Is there any other question you are going to argue about? [335]

Mr. Smith: I would like to recall Mr. Kelly. There are only one or two questions that I intend to ask him.

(Testimony of R. D. Kellmer.)

The Court: You may be excused, Mr. Kellmer, and you may take your record with you.

(Witness excused.)

Mr. Smith: I want to examine Mr. Kelly on something that developed in the testimony of Dr. Teed after he had testified, but particularly with reference to the statement that Dr. Teed gave him certain things. I want to ask him about it.

Mr. Connelly: I object to counsel cross-examining Mr. Kelly on the testimony of Dr. Teed. There has been cross-examination of Mr. Kelly on the testimony of Bunny, and of Bunny on the testimony of Mr. Kelly, but I do object to cross-examination of Kelly on something which was not touched upon in the direct examination. You cannot impeach the testimony of one witness by another's cross-examination. He can call him as his own witness and impeach him, but I do not think it is proper cross-examination to examine Mr. Kelly on what Dr. Teed says.

The Court: Mr. Kelly testified he went to Dr. Teed and got \$250 and had a conversation there with him and he gave him \$150—

Mr. Smith: It was \$125 and \$125 later at another place. [336]

The Court: I think that is what he said on cross-examination, but on direct examination he said, "He gave me \$250 that day and said he would give me another \$100 later." And when you came to cross-examine him it was \$125 and \$125, but

he said, "He gave me \$125 a few days later and twenty dollars for my trouble." I think they would have a right now knowing that there is some question about the fact he had received in addition to the \$125 or \$150, that he received something more. Suppose Dr. Teed said instead of giving him \$125 plus some morphine, he would say he gave him \$500. I think they can call him back and ask him, "Did you not, as a matter of fact, get \$500, and—"

Mr. Connelly: I do not think so. For what purpose? To prove Dr. Teed or Kelly is not telling the truth?

The Court: They can cross-examine on the direct examination. He said he got a certain amount. If they have reason to know at the time it was more than that or something in addition to that, they should have cross-examined him. If Dr. Teed had testified first, and they wanted to bring him back for more examination, I would not let them do it, but Mr. Smith and Mr. Gleeson had no way of knowing that Dr. Teed was going to testify that he gave him narcotics in addition. I will let you cross-examine him, if that is all you are going to do. [337]

Mr. Smith: Perhaps one other question I am going to ask, if he divided the \$250 with anyone. I am going to ask him if he gave Shirley any part of it.

Mr. Connelly: Is there any dispute about that?

Mr. Smith: I am going to ask Kelly if he gave Shirley any part of the \$250.

Mr. Connelly: That is not proper cross-examination.

The Court: You can call him as your own witness and be bound by his statement on that, but it is not cross-examination on the other. Bring in the jury and Mr. Kelly.

(The jury then took its place in the jury box.)

The Court: I think now that the testimony of Mr. Bezona has been received, I will remove from the exhibit the entrance slip—the last one. That has nothing to do with this case.

Mr. Connelly: I have no objection to that. I merely offered them all together.

The Court: I am not granting the objection to the next to the last one. I will instruct the jury to disregard that portion of the contract card which refers to any date of cancellation of it or any cancellation of it. It is admitted only for a consideration of the time during which this conspiracy is alleged to have taken place. The jury will disregard that portion on the back that shows the cancellation or the date of cancellation. [338]

EDWARD WILLIAM KELLY,  
recalled as a witness for the Plaintiff, further  
testified as follows:

Cross Examination

By Mr. Smith:

Q. You are the same Edward William Kelly  
who testified in this case before? A. I am.

Q. Mr. Kelly, do you recall when you were  
examined with regard to the payment of \$250 by  
Dr. Teed to you? A. Yes.

Q. And an additional payment of twenty dollars  
which he made to you? A. Yes, sir.

Q. Can you fix the date of that payment,  
approximately?

A. I think he made it on the 16th day of May,  
the 15th or 16th.

Q. Did I understand you to testify part of it  
was paid in Coeur d'Alene and part in Spokane?

A. That is right.

Q. How much was paid at Coeur d'Alene?

A. It seems to me he gave me \$125 or \$150 at  
Coeur d'Alene.

Q. And the balance of it was paid in Spokane?

A. Yes, sir.

Q. Where?

A. In front of the Union Pacific depot.

Q. That is the Union station? [339]

A. Yes, sir.

Q. On Trent Avenue? A. Yes, sir.

Q. At that time was that all that Dr. Teed gave  
you? A. No.

(Testimony of Edward William Kelly.)

Q. What else did he give you?

A. He gave me a bottle of morphine of quarter-grains.

Q. What did you do with the morphine?

Mr. Connelly: I object to that as improper cross-examination and as being incompetent, irrelevant and immaterial.

The Court: The objection is sustained. That is a matter you would have to cover if you wish to recall him as your witness.

Mr. Smith: That is all.

Mr. Connelly: That is all.

(Witness excused.)

Mr. Connelly: The Government rests.

(Whereupon, the following proceedings were had at the Court's Bench, without the hearing of the jury:)

Mr. Smith: The Government having rested its case in chief, the Defendant George Clayton challenges the sufficiency of the evidence to prove the crime of conspiracy, [340] as charged in the indictment, and moves for a dismissal of the case, or in the alternative, that the jury be instructed to bring in a verdict of not guilty as to said defendant.

The Court: The motion is denied and an exception allowed.

(Whereupon, the trial was resumed in the presence and hearing of the jury as follows, to-wit: Mr. Smith then made an opening statement of defendant's case to the jury.)

TESTIMONY ON BEHALF OF THE  
DEFENDANTS

ARTHUR DECKELMAN,

called as a witness for the Defendants, first duly sworn, testified as follows:

## Direct Examination

By Mr. Smith:

Q. Will you state your name, please, in full.

A. Arthur Deckelman.

Q. Are you employed at the Old National Bank?

A. The First Natitonal Bank.

Q. And what is your capacity there?

A. I am the Auditor.

Q. When you were examined the other day on your voir dire as a juryman, you mentioned the fact that you had cashed some checks or a check for the Defendant George Clayton? [341]

A. Yes, sir.

Q. Since that time at my request, have you examined your files and records at the bank to ascertain if you have a photostatic copy of the check referred to? A. Yes, sir.

Q. Do you have such a film? A. Yes, sir.

Q. Showing the check? A. Yes, sir.

Q. Will you tell us what this machine is (indicating).

A. That is the Recordex, a projecting machine that will show a picture of the check.

Q. What is the practice of the bank as to

(Testimony of Arthur Deckelman.)

making photographic films of every check that is cashed?

A. We photograph all checks that are drawn on our bank,—We photograph all checks drawn on out-of-town banks.

Q. Did you examine this Recordex machine and find out whether or not a check signed by one Dallas Lyons, dated April 8, 1944, in the sum of \$800, was shown on this film?

A. Yes, sir; I did.

Mr. Smith: I wonder if we might set this up and connect it so it will show for the jury?

(Recordex machine placed before jury.)

Q. Will you point out to the jury the check to which I have referred.

A. Right there (indicating on Recordex). [342]

Mr. Smith: I wonder if the jury might file by and see it.

The Court: What are you going to offer in evidence here?

Q. (Mr. Smith) Did we attempt to ascertain whether or not a photostatic copy could be made of that check? A. Yes, sir.

Q. And did we find anybody that would be willing to undertake it?

A. Not in Spokane, no, sir.

Mr. Connelly: I object to this thing being exhibited to the jury, until it is properly identified, and until it becomes competent.

Mr. Smith: We could take that piece of film

(Testimony of Arthur Deckelman.)

out if necessary, but I do not like to mutilate the bank's records.

Q. (Mr. Smith) Are those checks on a continuous roll? A. Yes, sir.

The Court: Is there an enlargement of this?

A. This is an enlargement of the checks. It is very small.

The Court: You do not wish to leave this machine here?

A. No, sir. I had orders to bring it back.

Mr. Smith: I thought we could have the jury see it and then have the witness read the face of the check into [343] the record.

Mr. Connelly: I object to the jury seeing it. It is not the best evidence, and there is no showing the original is not available.

The Court: Have you got another film showing the back of it?

A. No, sir. We do not photograph the back of them.

Mr. Smith: I will produce further evidence as to who presented the check, if Your Honor please.

The Court: For the present just put it to one side and present your other evidence and we will see.

Mr. Connelly: Until it is admitted, may it be removed?

The Court: Yes. Turn out the light in the machine. (Light turned out in machine.)

Q. (Mr. Smith) Do you recall on or about the date April 8, 1944, that a check drawn on the

(Testimony of Arthur Deckelman.)

account of Dallas Lyons in the First National Bank of Spokane, was presented at that bank for payment?

A. This particular check was cashed, yes.

Q. And do you recall the person who presented that check for payment?

A. Yes, sir; Mr. Clayton.

Q. Is the person who presented the check for payment the George Clayton who is here in the Court Room sitting by the [344] table?

A. Yes, sir.

Q. At the time the check was presented for payment, was there some question about cashing it?

A. Yes, sir; there was. May I enlarge on that?

Q. Yes.

A. Mr. Clayton came in the bank and had, I think, three or four checks signed by Dallas Lyons, and Mr. Lyons had been drinking and his signature was almost illegible, and we refused to cash the checks, and the teller asked me to check up on it, and the funds were in the bank, but I refused to cash it because the signature was not exactly right, and we went up to the cashier's desk and Mr. Clayton said he would get the maker of the check there, and I talked to Mr. Lyons and he said it was all right to cash the checks, and we told him the signature was not very good and we would prefer that he make a new check for the three or four checks, and we would pay the money for them, and there was a check for \$800 made out, and we cashed it, and Mr. Clayton and Mr. Lyons were both there.

(Testimony of Arthur Deckelman.)

Q. Did Mr. Clayton endorse the check?

Mr. Connelly: That is objected to as not the best evidence.

The Court: Objection sustained.

Q. (Mr. Smith): Did you pay Mr. Clayton the money on the check? [345] A. Yes, sir.

Q. You gave him the \$800? A. Yes, sir.

Mr. Smith: We offer in evidence the visual evidence we have of the check for the benefit of the jury.

Mr. Connelly: I object to it as not competent, relevant or material and as not being the best evidence.

The Court: The objection is overruled. They may look at it.

Mr. Connelly: May I interrogate the witness?

#### Voir Dire Examination

By Mr. Connelly:

Q. Did you yourself pay Mr. Clayton this money?

A. I cannot recall whether I took him back to the window or whether I got the money from the teller myself.

Q. You were not the teller? A. No, sir.

Q. You have a desk up in front?

A. I have a desk on the balcony and I also relieve at the desk down in the front part in the absence of some other officer.

Q. Did Mr. Clayton have a checking account at the bank? A. I don't believe he did.

Mr. Connelly: That is all. [346]

(Testimony of Arthur Deckelman.)

Direct Examination—(Resumed)

By Mr. Smith:

Q. Will you turn on the light?

The Court: Read into the record what that check says.

A. The check which now shows on the projection machine is a check drawn on the First National Bank of Spokane, dated April 8, 1944, payable to cash for \$800, signed Dallas Lyons, and cashed by our teller, I believe No. 9.

The Court: All right. The jury may form in line and look at the check. Point it out to them.

(The jury then filed by the Recordex and examined portion of film therein shown.)

Mr. Smith: You may cross-examine.

#### Cross-Examination

By Mr. Connelly:

Q. Was Mr. Lyons a regular customer of the bank?

A. I think he had an account there off and on, oh, I would say for three or four years.

Q. Does he still have an account there?

A. No, sir.

Q. When did he close it?

A. I do not think he has. I think he closed it on April—it was sometime after that—in fact, I closed it for him. I think it was about the 12th or the 17th, somewhere there. [347]

Q. What is his business?

A. I think—I believe he runs a beer parlor or a

(Testimony of Arthur Deckelman.)

pool room or card room or service station at Pendleton, or did at that time.

Q. At Pendleton, Oregon?

A. Yes, sir. That is what he told me.

Q. That is the only time you ever saw him, is it?

A. Mr. Lyons?

Q. Yes.

A. No, sir; I saw him on other occasions.

Q. Do I understand he was intoxicated on this occasion? A. Not when he came in, no.

Q. But you said something about his having been been intoxicated.

A. I guess maybe I assumed that, because his signature was so irregular.

Q. Did you ask him if he was intoxicated when he wrote the checks? A. No, sir.

Q. What did you say to him when you refused to cash the checks when Mr. Clayton produced them?

A. I think we asked him if these were his checks and he said yes, and it was all right to give him the money, and we told him his signature was not too good, and if it was all right with him we would like to have a new check for them. [348]

Q. Did he state what it was for?

A. No, sir; he did not.

Mr. Connelly: That is all.

Mr. Smith: That is all.

(Witness excused.) [349]

## GEORGE CLAYTON,

called as a witness in his own behalf, first duly sworn, testified as follows:

## Direct Examination

By Mr. Smith:

Q. Will you state your name, please.

A. George Clayton.

Q. What is your age?

A. Forty-one

Q. And how long have you lived in Spokane?

A. Off and on all my life.

Q. Where were you born?

A. Here in Spokane.

Q. I notice you have a limp. Will you explain what the cause of that is.

A. Well, the doctors claim something is wrong with my back and it is pressing on a nerve in my leg.

Q. A sort of a sciatica?           A. Yes, sir.

Q. How long have you known Shirley Doores?

A. About five years.

Q. During that period of time has there been a common law relationship of husband and wife existing between you and Shirley Doores?

A. I guess you could call it that.

Q. During that period of time how much of the time have you [350] and she resided together?

A. Oh, I would say out of the five years maybe we was together five or six months.

Q. Will you explain the reason for that?

A. Well, she just wasn't around.

(Testimony of George Clayton.)

Q. Did you know where she was?

A. No, I didn't.

Q. Do you know other members of her family?

A. Yes, I do.

Q. And whom do you know in her family?

A. I know her father.

Q. What is his name?

A. William Doores.

Q. And is he also known as W. E. Doores?

A. Yes, sir.

Q. Where does he live?

A. I believe in Martindale, Montana.

Q. Who else do you know?

A. I know Bunny Doores and Robert Doores and her sister Jean Doores.

Q. During the past year or so what has been your occupation?

A. Well, I work in a card room—Moore's Card Room—and I have done considerable gambling.

Q. Did you while you were at Moore's card room become acquainted with Ed Kelly, the man who testified here? [351] A. Yes, sir.

Q. Can you tell us when that was?

A. Well, I just can't tell you. Somebody else hired him. It wasn't me, but I think sometime in the winter of 1943.

Q. And you say he was hired at Moore's card room? A. Yes, sir. He worked there.

Q. In what capacity?

A. Well, what you would call a booster, I guess, in a poker game.

(Testimony of George Clayton.)

The Court: What is a booster in a poker game?

A. They sit down and play and try to make it look like a poker game when nobody else is playing.

Q. (Mr. Smith): When did you see Bunny Doores with reference to this matter that is on trial—how long before?

A. You mean when I first saw him when he first came back?

Q. Yes.

A. Well, he come from Walla Walla sometime in the fall, I believe, of 1943.

Q. And when he came here where did he go?

A. He come out to my house.

Q. Did you take him in? A. I did, sir.

Q. How long did he stay at your house?

A. He lived with me for about—Him and I alone was there about three months.

Q. Do you know where Shirley Doores was at that time? [352]

A. Well, I didn't know at that time where she was, but when she come back she said she had been in Montana and North Dakota, and some place up there.

Q. Did Bunny Doores have any employment at that time?

A. No, sir; he wasn't working, but he likewise went to work at Moore's card room.

Q. Did you know Dr. E. H. Teed of Coeur d'Alene? A. No, sir.

Q. At that time or at any time until you came to the court room here, had you ever seen the man?

(Testimony of George Clayton.)

A. I never saw him in my life until I saw him out here, and somebody said that was Dr. Teed.

Q. Did you know of your own knowledge that Shirley Doores had been going to Dr. Teed, beginning sometime in December, 1943, and getting narcotics?

A. I didn't know what the doctor's name was, but she said a time or two she was going to see some doctor in Coeur d'Alene.

Q. To get narcotics?

A. I imagine that was it.

Mr. Connally: I object to what he imagines, and I move that the witness be instructed to answer the question.

A. Shirley was very secretive.

Mr. Connally: I object to the voluntary statement of the witness. [353]

The Court: I will strike the last part of his last answer and likewise the voluntary statement.

Q. (Mr. Smith): Can you fix the time, about the time, she returned here this year or last year?

A. She returned from where?

Q. Wherever she was, in Montana or North Dakota. A. You mean recently?

Q. Last spring.

A. I think she came back sometime in February. I am not sure.

Q. Did she come out to the house?

A. Yes, sir.

Q. Was Bunny Doores living there at that time?

A. Yes, sir.

(Testimony of George Clayton.)

Q. Do you know how many times Bunny Doores and Edward Kelly had been out to your house or the house prior to April 9, 1944?

The Court: You mean both at the same time?

Q. At the same time, I mean.

A. They were there several times—Kelly and Bunny; especially when Shirley was there—Bunny would come to see his sister and Bunny and Kelly was friends and they generally would come together.

Q. Do you recall a Sunday afternoon, April 9, when Kelly and Bunny came to your house for dinner, and a certain discussion took place in reference to going up to [354] Coeur d'Alene to see Dr. Teed? A. No, sir.

Q. Were you present at any such conversation?

A. No, sir.

Q. Did you ever suggest to Bunny in the month of January that he assume to play the part of a federal narcotic agent and go to Coeur d'Alene and throw a scare into Dr. Teed? A. No, sir.

Q. Did you ever ask Bunny Doores to procure for you a federal badge and credentials?

A. No, sir.

Q. For such a man? A. No, sir.

Q. Did you at any time either on or around the first of February, 1944, or at any other time, point out to Bunny Doores a tall, dark complected man, and tell him that you had propositioned this man to go to Coeur d'Alene and he had refused to do so because you could not furnish the badge and credentials? A. No, sir.

(Testimony of George Clayton.)

Q. At any time at your house in the month of January did you get up in the morning and go outside and remain for an hour or so and then come back into the house and state to Bunny Doores you had found a man to go to Coeur d'Alene [355] on that Dr. Teed deal, and that you wanted to get some credentials and a federal badge?

A. No, sir; it isn't so.

Q. During the time that Bunny Doores and you were living together, did you ever have any trouble with Bunny Doores with reference to a ring and some money that belonged to you?

A. Yes, sir; I did.

Q. Will you fix the time as nearly as you can?

A. That was while Shirley Doores was in Montana.

Q. What month?

A. It was—I couldn't say for sure, but I think it was possibly the first part of February, because I think she came back sometime in February.

Q. Do you recall when Bunny Doores went to Montana in February or around that time, or do you know whether he went or not?

A. Yes, sir; he was on a trip over there.

Q. What was the incident to which I have referred about the diamond ring and some money?

A. Well, he tried to steal my ring, was all.

Q. When and where did this occur?

A. In the house.

Q. Will you describe it in detail to the jury?

(Testimony of George Clayton.)

A. Well, him and I had been out on a little drinking party [356] and we went home and I laid my ring and pocket book up on the dresser and went to bed, and maybe I was in bed twenty minutes when I heard a little creaky noise and I woke up and I seen him reach up—he was fully dressed—and take my ring and start backing out with it. I jumped up quick and turned on the light, and by the time I got ahold of him he was going out the back door, and I said, "What are you going to do with the ring?" and he said, "Oh, nothing. I was going to put it away and take care of it while you was drinking." And I said, "Give me the ring. I will take care of it" and he gave me the ring, and I put it on my finger and went back to bed. And I laid there a few minutes—he was in Shirley's room—and I thought I would count my money, and see if he had taken any, and I got up and I had \$120, and I figured that was about right, and I went back to bed, and next morning when I got up he was gone with my car. I looked at my pocket book and there was fifty dollars left in it.

Q. By the way, what kind of a car did you have at that time? A. I had an Oldsmobile.

Q. Do you still have the same car?

A. Yes, sir.

Q. Since that time have you and Bunny Doores been on agreeable terms or not?

A. No. We agreed to disagree. [357]

Q. Was this a valuable diamond ring?

(Testimony of George Clayton.)

A. Yes, sir. It was worth about four thousand, I presume—now.

Q. Do you recall being at Moore's card room on the afternoon of April 10th when Kelly came in and you and he went across to the Turf——

Mr. Connelly: I object to any leading questions on the part of counsel.

Mr. Smith: I am just directing his attention to an incident.

The Court: Overruled.

Q. (Mr. Smith): And he went across to the Turf——

Mr. Connelly: Again I object to the leading form of the question.

The Court: The objection is overruled.

A. You say we went across the street?

Q. I say, do you recall an incident of that kind?

A. I wouldn't say for sure. When he was working there he was running across the street several times a day for coffee.

Q. Do you recall any conversation at about that time with Kelly in the Turf Cafe in which you asked him, "How did you come out up there?" or words to that effect? A. Up where?

Q. Just that—"How did you come out up there?" or "How did you come out up there at Coeur d'Alene?" [358] A. No, sir.

Q. Did you know that Kelly and Shirley Doores had been to Coeur d'Alene on the 10th of April?

A. No, sir; I did not.

(Testimony of George Clayton.)

Q. Did you know what time Shirley Doores had left the house that morning?

A. The 10th of April?

Q. Yes. A. No, I don't.

Q. You mentioned the fact Shirley had a bedroom in the house? A. Yes, sir.

Q. Do you have a separate bedroom?

A. Yes, sir.

Q. How far removed from her bedroom is your bedroom?

A. Her room is in the back and there is the kitchen and—two rooms between them.

Q. Did she occupy that room back there?

A. Yes, sir.

Q. And what part of the house was your bedroom in?

A. I was in the front and her room was in the back.

Q. Were you present at any conversation with Edward Kelly, Bunny Doores and Shirley Doores, on the afternoon of April 10th, where any discussion was had about anything that had occurred at Coeur d'Alene, Idaho? A. No, sir. [359]

Q. Did you stand in front of the Turf Beer Parlor on that afternoon for ten or fifteen minutes and talk to Shirley, after which you came into the Turf with her and some statement was made, either by her or by you, to Kelly and Bunny that she only got \$300, and that part of that was in a check?

A. No, sir.

(Testimony of George Clayton.)

Q. Do you recall an incident out at your house when Kelly and Bunny came out there while you were not in the house and some trouble occurred?

A. Yes, sir.

Q. Can you fix the date when that was?

A. I don't remember what the date was, but it was sometime in May.

Q. Describe to the jury in your own words what occurred.

A. Well, this was the first that I got wind or word or something that there was trouble. I was out in the garden and Shirley comes to the back door and hollered for me to come in. I came in the house. Kelly was seated there, and Bunny Doores was standing by the door, and there was nobody saying anything. They was just sitting there, and Bunny was standing, and Shirley was sitting there and Kelly sitting here (indicating). Bunny Doores said, "Well, we might just as well go, Kelly. That is fourteen thousand we never will get a nickel out of." I don't [360] recall, but I believe Kelly said, "Well, there will be something done about this." And Bunny Doores says, "Yes, there will be some squawking done, loud and long, and they went out the door. After they went out I said to Shirley, "What is this?" and she said to me, she said, "It is none of your business. It is my affair and it doesn't concern you at all."

Q. What has been Shirley's attitude, her habitual attitude, toward you, when you tried to inquire, or if you did inquire into her activities?

(Testimony of George Clayton.)

Mr. Connely: That is objected to as calling for a conclusion.

The Court: I think it does call for a conclusion, Mr. Smith.

Q. (Mr. Smith) Will you state whether or not Shirley Doores was frank and open in advising you of any activity on her part, or the opposite.

Mr. Connely: I object to the question for the same reason. It calls for a conclusion.

The Court: I think so.

Mr. Smith: He can say either way.

The Court: You can ask if she would tell him where she had been and what she was doing, but to ask if she was frank is asking for a conclusion. You can ask if she did tell him where she had been and what she was doing. [361]

Q. (Mr. Smith) Mr. Clayton, on any of these occasions when Shirley came back after being away, would she tell you where she had been or what she had been doing?

A. No, sir. She only told me what she wanted me to know.

Mr. Connely: I move the last part of the answer be stricken and the jury instructed to disregard it.

The Court: I will grant the motion.

Q. (Mr. Smith) Did you ever agree at any time that you would drive your car over to Cœur d'Alene and take Kelly and Shirley over there?

A. No, sir.

(Testimony of George Clayton.)

Q. Did you ever make the statement to Bunny Doores or in his presence that if there was any trouble you didn't want your car seen over there?

A. No, sir.

Q. Was there any arrangement with you and Shirley Doores, Bunny Doores and Edward Kelly, that you were going to answer a phone call at the Halliday Hotel on April 10th and pretend to be Mike Sanders? A. No.

Q. And was it stated to you—or did you state you wanted to sleep in, or had other business to do, and ask Bunny Doores to do it for you?

A. No, sir.

Q. Referring again to the afternoon of April 10th at the [362] Turf Cafe, did you ask Kelly "How did you come out at Coeur d'Alene, or up there?" and did Kelly state to you, "Everything worked out just as planned."?

A. No, sir.

Q. Did you ever state to any of those persons that Dr. Teed had not come up with as much as you thought he would? A. I didn't get that.

Q. Did you ever state to any of those persons that Dr. Teed had not come up with as much as you thought he would? A. No, sir.

Q. Did you ever state to Bunny Doores that Dr. Teed was going to get some more money in a day or so? A. No, sir.

Q. Did you loan Bunny Doores \$100?

A. I have loaned him more than \$100, ten dollars and twenty dollars at a time.

(Testimony of George Clayton.)

Q. Did you loan him \$100 on or about the 10th or 12th of April? A. No, sir.

Q. Did you ever mention to him anything in connection with little white tablets, referring to morphine? A. No, sir.

Q. Now, Mr. Clayton, did you have in mind purchasing some kind of an establishment at Pasco?

A. I did. [363]

Q. Did you go to Pasco in the month of April?

A. Yes, sir.

Q. And do you recall when that was?

A. Well, it was the latter part of April.

Q. Who accompanied you to Pasco?

A. Oh, a fellow named Sam Lavin, a salesman, rode down with me.

Q. On that occasion did Kelly and a girl named Rita Taylor go with you?

A. No, sir. That was the trip before. They went down a month or so before that. About a month before that.

Q. That is the trip I am referring to.

A. Oh.

Q. Did you go to Pasco one time with Mr. Kelly? A. Yes, sir.

Q. And a woman named Rita Taylor?

A. Yes, sir.

Q. And on that trip did you talk with Kelly, or did you state to Kelly on that trip to Pasco, that you knew that Shirley had only gotten \$600 from the doctor? A. No, sir.

(Testimony of George Clayton.)

Q. Did you also state to Kelly on that trip and during the course of that trip that what Bunny Doores did should not entitle him to any of the money at all? A. No, sir. [364]

Q. Did you ever tell Kelly at that time or at any other time that if he told anybody about the matter you would get someone to come in and keep him quiet?

A. No, sir; I never told him nothing.

Q. Did you tell Kelly that not to tell Bunny's wife about this matter or she would be sure to tell Anderson and Albright? A. No, sir.

Q. And you would all be put in jail?

A. No, sir.

Q. Did you ever call Bunny up on the telephone and tell him in effect, "You and that other rat had better keep your mouths shut or I will bury you in the state penitentiary"?

A. I never told him that in my life.

Q. And, "You know I have the money to do it with"—or words to that effect? A. No, sir.

Q. Did you ever show Bunny a wallet containing some money which you stated to him was \$6,000? A. No, sir.

Q. Did you ever have \$6,000 at one time?

A. It has been a long time— No, I haven't.

Q. You referred to making a second trip to Paseo. A. Yes, sir.

Q. And on that occasion who went with you?

[365]

A. Sam Lavin.

(Testimony of George Clayton.)

Q. Was Sam Lavin contemplating going into business with you?

A. No. On my first trip down he rode back with me, and he was telling me about a place for sale, and he wanted me to go back down and look it over, and he wanted to take a ride.

Q. Can you state when that next trip was made?

A. It was the last of April. I ain't sure of that.

Q. At that time did you borrow any money from anybody around that time when you were contemplating buying this place?

A. Yes, sir. Before I made the trip down there I borrowed \$2000.

Q. Did you have the money with you?

A. Yes, sir.

Q. When you came back what did you do with the money? A. I put it in the bank.

Q. In what bank?

A. The Old National Bank.

Q. In your bank account? A. Yes, sir.

Q. Whom did you borrow the \$2,000 from?

A. From my mother.

Q. What is her first name?

A. Jennie Clayton.

Q. Did you also deposit \$1,050 in your account in the Old [366] National Bank on April 12th?

A. I did.

Q. Where did you get that money?

A. That was money that we took in the card room down there.

(Testimony of George Clayton.)

Q. Was part of that money \$800 you had gotten from a man named Dallas Lyon?

A. Yes, sir.

Q. And was that represented by a check which you cashed at the First National Bank?

A. Yes, sir; that is right.

Q. Do you recall the occasion when that check was cashed?

A. When I cashed it at the First National Bank?

Q. Yes.

A. The first of April. I don't know the date.

Q. You heard Mr. Deckelman testify today?

A. Yes, sir.

Q. Was part of that money that you got on that check, was that put in to make the \$1050, deposit? A. Yes, sir.

Q. There has been some testimony concerning a deed or some deeds to this property. You first acquired it when?

A. I first bought the place—I don't know the date—but sometime in September, I believe, in 1943.

Q. How much did you pay for it?

A. I paid down \$1500. [367]

Q. Was there a mortgage on the property?

A. Yes, sir; there was

Q. Did you assume that mortgage?

A. Yes, sir.

Q. How was the place furnished?

A. You mean the furniture?

(Testimony of George Clayton.)

Q. Who bought the furniture?

A. I bought part of it and part of it was there, and Shirley bought some of it.

Q. Do you know where she bought the furniture?

A. She bought it from Pratt's Furniture Store, I believe.

Q. You don't know that to be a certainty?

A. Well, I heard the man's testimony here that she bought a davenport and chair.

Q. I was not referring to that transaction. I was referring to September, when you moved into the house.

A. Yes. I don't know where she bought it.

Q. Now, Mr. Clayton, showing you first for identification a document marked Defendant's Exhibit "D," I will ask you to state if that is a deed you executed and gave to Shirley Doores?

A. Correct.

Q. And handing you now a document marked Defendant's Exhibit "E," and ask if that is the deed which Shirley Doores gave to you? [368]

A. Yes, sir.

Q. And handing you a document marked for identification as Defendant's Exhibit "F," I will ask you to examine that and state if that is a deed you gave to Shirley Doores? A. Yes, sir.

Q. Will you explain to the jury, Mr. Clayton, this first transaction covered by Exhibit "D"?

A. Well,—

(Testimony of George Clayton.)

The Court: Will you give the dates of the deeds?

Mr. Smith: I will let Mr. Clayton look at them and then I will offer them. The first two are deeds that have been testified to. You have no objection to their being admitted?

Mr. Connelly: If you say they are the same as those testified to, I have no objection.

The Court: Defendant's Exhibits "D" and "E" may be admitted.

(Whereupon, Deeds marked for identification Defendant's Exhibits "D" and "E," were admitted in evidence.)

[Printer's Note]: Set out in full at pages 84-86 of original reporter's transcript.

Mr. Smith: Exhibit "D" is a deed from George Clayton to Shirley Doores, dated February 4, 1944. Exhibit "E" is a deed from Shirley Doores to George Clayton, dated May 8, 1944. Do you object to the admission of this?

Mr. Connelly: Yes, sir, I do. It is a self-serving [369] declaration and not properly identified.

Mr. Smith: We will bring Mr. Berkey in later.

Mr. Connelly: Until you do, I will object to this exhibit.

Mr. Smith: I do not think the objection is well taken, Your Honor.

The Court: It may be admitted.

(Whereupon, Deed marked for identification Defendant's Exhibit "F" was admitted in evidence.)

(Testimony of George Clayton.)

[Printer's Note]: Set out in full at page 89  
of original reporter's transcript.

Mr. Smith: Our exhibit "F" is a deed from George Clayton to Shirley Doores, dated May 16, 1944. All of these deeds are for the same property.

Q. Will you explain this first transaction with Shirley Doores to the jury.

A. Well, I bought the place and put down \$1500. The consideration was \$3000, with \$1500 more to be paid. Do you want me to go through the whole thing?

Q. Yes.

A. And I built the garage and sidewalk at this place, which cost me about thirteen or fourteen hundred dollars. Then I traded the place to Shirley Doores, after I had paid—I just forgot how many payments—for this diamond ring. It was valued at \$3000.

Q. Did you know where she got the ring?

A. She got it on the Coast some place. I don't know where.

Q. Did she ever tell you where? [370]

A. I just don't remember.

Q. Will you explain, then, the transaction represented by Exhibit "E," the deed of May 8, 1944.

A. Well, Shirley had borrowed money from me.

Q. How much?

A. Fifty and \$100 or so at a time, until she owed me around \$2000, and at the time she gave me this deed she said, "If you will give me \$1000

(Testimony of George Clayton.)

I will deed you back the place—the property."

Which I did.

Q. And you received that deed?

A. Yes, sir.

Q. Now then, will you explain the deed, Exhibit "F," dated May 16th, from yourself to Shirley Doores?

A. Well, we had a little misunderstanding—This one here—Shirley Doores wanted the place back. She told me a friend of hers by the name of Al Lindley sold some property and she had the money and wanted to buy the place, and I said, "All right; I will sell you the place for \$3000," and she had me go and get this deed, and when I gave her the deed she was supposed to have the money with her, but she had \$1250, which she gave me, and she said, "I will get you the rest of the money tomorrow," and she stopped and studied and said, "If you will give me your interest in the furniture and the place—" she said, "There is a mortgage on the place, too" and said "Yes." [371] And we looked it up, and it was \$1250, and she said, "If you will give me your interest in the furniture, tomorrow I will give you \$3000, and take this \$1250 and go and pay the mortgage off, because I want the place clear." So with this \$1250 I goes and pays the mortgage off, and she was going to give me the \$3000.

Q. Did you get it? A. Not yet.

Q. What happened with reference to Shirley next day? Where did she go?

(Testimony of George Clayton.)

A. The next day—

Q. Or around that time?

A. Either that day or—I still believe it was that day—I wouldn't say for sure—She went to the hospital, so she told me. She said, "You stay and take care of the place and come and see me and bring me what I want"—she meant like cigarettes and candy—"when when I come out of the hospital I will get you the \$3000. I have the money," she said. When she gets out of the hospital that night—she got out in the evening—the next day she was going down and get me the money, but that day she got arrested.

Q. Were you at the house the day she was arrested? A. Yes, sir; I was.

Q. And before that time did Ed Kelly come to the house? A. Yes, sir. [372]

Q. Will you relate to the jury what occurred when he came out.

A. Well, Shirley was there. That was the next day after she got out of the hospital, and her doctor was there, Dr. Sells, and they were sitting there talking when Kelly knocked on the door and he come in about six miles an hour, and he asked me—He called me in the back room, and he said, "Has the bulls been out here?" That is the way he stated it—"bulls," and I said, "No," and he said, "We are all going to get arrested," and I said, "For what?" and he said, "Why, that Coeur de'Alene proposition." He said, "Bunny called me up awhile ago and I went up and saw him and

(Testimony of George Clayton.)

he told me to get on the train and get clear out of the country;" that Shirley was going to be arrested and I—George—me—was going to be arrested, and I said, "Why am I going to be arrested?" and he said, "That is what I asked Bunny," and he said, "The only answer I could get was if Shirley goes to the pen George might as well go, too, because I don't like him." About that time Shirley came in and said, "Come here, Kelly. What is it?" and he said, "It is about the doctor at Coeur d'Alene," and she said "Shu! Keep still. I will talk to you," and she took him in the bedroom. I don't know what the conversation was, (but when they come out she said, "We have got to go to Coeur d'Alene right now.") The doctor had left in the meantime and Kelly spoke up and said, "Well, [373] I don't know whether Bunny has given me the run-around, trying to get me out of town, or whether Bunny has stooled on us. What do you think about it, Shirley?" and she said, "My God, I don't know. We will have to go to Coeur d'Alene and find out," and Kelly stated, "If I thought Bunny had stooled on me I would go down town to the hotel and get my gun and kill him," and she gets ready and she gets in her car and her and Kelly goes to Coeur d'Alene, and they gets arrested while they was over there.

Q. You speak of her car. When did she show up with that automobile?

A. Well, that was sometime the first of May.

(Testimony of George Clayton.)

I would say along about the 5th or 6th or 4th or 5th.

Q. Did you ask her about the automobile?

A. I did.

Q. What did she say and what did you say to her?

A. Sam Lavin and I was in the house. I hadn't saw Shirley for a day or so. We was cooking supper and Shirley drove up in this car, and in the car was Bunny Doores and Bunny Doores' wife. I said to Shirley, "Where did you get the car?" and she said, "A friend of mine from Butte, Montana, is here and left the car with me, and is going to be gone to California three months, and I am to keep the car."

Q. What developed later on? [374]

A. I never knew the difference until about, oh, three weeks or something like that, I guess—maybe it wasn't that long. It was some time before the arrest in May, in the mail box was a certificate of title, a registration card, I should say, made out to W. E. Doores, and said, "Shirley, you bought that car." "Oh, yes, yes; I bought it."

Q. Did you ask her any more about it?

A. No, I don't believe I did.

Q. What is that?

A. No, I didn't ask her any more, I don't think. I don't remember.

Q. Did any conversation ever take place at your house when Kelly and Bunny came there and claimed that they hadn't got a fair split of the

(Testimony of George Clayton.)

money from Dr. Teed, and you were made and something was said by Kelly about putting the finger on you, and you said, "Go ahead, put the finger on me?" A. No, sir.

Q. Did you know anything positively about what was going on until this occasion that you testified to concerning the three of them having the words in your house when you were called in?

A. Well, I didn't even know up until the date I was arrested what it was all about, because when Kelly and Bunny come back from Coeur d'Alene, Bunny said, "Kelly, we might as [375] well go; that \$14,000, we ain't going to get a nickle out of it," and Kelly said, "Yes, I guess we will, too, sometime," and Bunny said, "What I am going to do is to do some squawking, and——"

Mr. Connelly: I object to that.

Mr. Smith: That is repetition. He has testified to that.

The Court: Yes.

Q. (Mr. Smith): How long have you been laid up with that bad leg?

A. I have been this way for very near nine months, I think.

Q. About November 20th, just the other day, did you have a visit at your house when you were laid up with your leg, from Robert Doores?

A. Yes, sir.

Q. And Bunny Doores? A. Yes, sir.

Q. What time of day was it?

A. It was in the morning sometime.

(Testimony of George Clayton.)

Q. Will you relate to the jury what occurred on that occasion.

A. Well, Bob Doores and Bunny Doores came out to the house. I was laying there and they come in and I recognized Bob Doores. I think I only seen him once before.

Q. You have seen him only once before?

A. Yes, sir; one time before. [376]

Q. When was that?

A. Sometime last winter, sometime. I wouldn't say the date. But I looked up and here was Bunny Doores, and I said to Bunny, "What do you want here?" and he said, "I want to talk to you," and I said, "I don't want to talk to you," and then he started out to say how sorry he was, and he said, "I know I have treated you wrong; I have lied about you and everything, but I had to do it to clear myself," and he said, "If you will let me have enough money to get out of the country, I won't testify agin you," and he said, "It will help me, because if I am caught they will send me back to Walla Walla for fifteen years," and I said, "Bunny, there is the door," and he started talking some more, and I said to his brother, "Take him out of here."

Q. Have you ever at any time in your life used narcotics of any character? A. No, sir.

Q. Did you ever have any difficulty with Bunny over narcotics?

A. No, I never had no difficulty with him over narcotics. The only difficulty I had was—

(Testimony of George Clayton.)

Mr. Connelly: I submit that he has answered.

Q. Did you finish your answer?

A. I never had no difficultly with him over narcotics.

Q. You were going to say the only difficultly you had was over—[377]

A. When he stole my ring.

Mr. Smith: I think you may cross-examine. There may be other matters, but I will have to go through my notes.

The Court: I would like to ask about this ring.

Examination by the Court:

Q. You got the ring referred to in this deed from Shirley. That is the one he tried to steal from you? A. Yes, sir.

Q. And this deed you got February 4th?

A. Yes, sir.

Q. Was that the same ring you get from Shirley?

A. Yes, sir; the same ring; the only and only.

Q. And you delivered this deed on that day?

A. That is right.

The Court: Will you read back his testimony about the ring.

(Reporter read testimony of this witness as requested by the Court.)

Q. If Shirley gave you this ring the 4th of February, and she had been in Montana for several months, and you and he were living out there together, I will ask you how it came about that he

(Testimony of George Clayton.)

attempted to steal this ring from you before Shirley got back from Montana?

A. I was wearing the ring. She let me wear the ring.

Q. You were wearing the ring? [378]

A. Yes, sir.

Q. It was her ring?

A. Yes, sir. She let me wear it.

The Court: All right. That is all. It was really his sister's ring he was stealing from you?

A. Yes, sir.

Q. It was not your ring? A. No, sir.

Q. At that time you had not had the transaction with her about the ring? A. No, sir.

Q. He was stealing his sister's ring from you and not your ring? A. Yes, sir.

The Court: Go ahead.

#### Cross Examination

By Mr. Connelly:

Q. When did you deliver this deed dated May 16, 1944, to Shirley Doores?

A. On the same date.

Q. And when did she deliver you any money on connection with that?

A. When I gave her the deed.

Q. How much money? [379]

A. Twelve hundred and fifty dollars.

Q. On June 2nd you conveyed this property to Carl Caplan by warranty deed?

A. Yes, sir.

(Testimony of George Clayton.)

Q. And Mr. Caplan still has that deed?

A. Yes, sir.

Q. This transaction was a nullity, was it not?

Mr. Smith: I object to that.

The Court: Sustained.

Q. When did you learn that Shirley had never recorded this deed?

A. She told me she wouldn't record the deed until she paid me the money.

Q. When did she tell you that?

A. When she gave me the \$1250.

Q. How many bedrooms are there in that house out there? A. Two.

Q. One of them is a porch of the house, is it not, screened in? A. No, sir.

Q. Did Shirley ever live in the front room of that house?

A. No. She lived in her own room.

Q. She left all her clothes and toilet articles, cosmetics, in the house, in the front bedroom, did she not, and they were there on the day she was arrested?

A. Most of her stuff was in the front room. She kept them [380] all over the house.

Q. In the front room where you slept?

A. Yes, sir. That is where the closet was.

Q. And her cosmetics and toilet articles she kept in the front bedroom, too, did she not?

A. Some.

Q. How long do you say you have lived with

(Testimony of George Clayton.)

Shirley Doores in the common law relationship of husband and wife?

A. We have been together—I met her around five years ago.

Q. And you have lived together as husband and wife since that time?

A. Well, she has not been with me—I would say she has been with me not more than five or six months out of the five years that we have been together.

Q. When did you buy this house in the valley?

A. September sometime, in 1943.

Q. And she helped furnish it?

A. Yes, sir.

Q. And you lived in it from then until when?

A. Until now.

Q. And prior to that where have you and she lived together? A. Different hotels.

Q. Name some of them.

A. I stayed at the Pacific Hotel. She wasn't there very much of the time. She was on the Coast. [381]

Q. During any of the time you lived there did she live with you as your wife?

A. Well, I had the room rented—

Q. Representing herself as your wife?

A. I don't think there was nothing said about that. I had a room in my name and she would come and stay one day and be gone two or three months.

(Testimony of George Clayton.)

Q. What other hotel did you and she live in together as husband and wife?

A. None here.

Q. In what other places did you and she live together? A. We was in Seattle.

Q. How long?

A. And we had two rooms there, I believe. I am sure we had two rooms there.

Q. At what place?

A. At the Gatewood Hotel.

Q. How long did you and she live at the Gatewood Hotel? A. I couldn't say.

Q. Approximately?

A. I couldn't tell you that, either.

Q. How long did you live in Seattle?

A. I was there about a year.

Q. How long to your knowledge has she been a morphine addict?

A. Well, I would say when I first discovered she was using [382] narcotics was probably after I was with her, oh, around a year, a year before I knew she was using narcotics. I believe that is right.

Q. When did you discover she was a user of narcotics?

A. Well—When did I discover it?

Q. Yes.

A. Well, Shirley never let me know. She kept it very secretive from me.

Q. When did you discover she was a user of narcotics?

A. I guess after I was with her about a year.

(Testimony of George Clayton.)

Q. And that was four years ago?

A. I imagine.

Q. And to your knowledge has she been a user of narcotics from that time to the present?

A. She has used it and been off of it, and I tried to help her.

Q. For what period of time has she been off it.

A. She has been in jail in different places. Three or four months in Seattle, and in jail here, and then she would be off—

Q. The city or county jail?

A. The city jail here.

Q. For a few days or a month?

A. For a month or two.

Q. Occasionally? [383] A. Yes, sir.

Q. In Seattle for a few weeks?

A. I think she was three months in Seattle in jail.

Q. At one time? A. Yes, sir.

Q. And the rest of the time when she was not in jail she was an addict?

A. She was on trips. She would be gone two or three weeks or a month at a time and I never knew where she was.

Q. How long have you worked at Moore's?

A. I have worked there about a year and a half, I think.

Q. In what capacity? I did not understand what your duties were. Do you have charge of it?

A. No, sir. Mr. Smith said I had charge, but

(Testimony of George Clayton.)

I didn't have charge. I worked there the same as the rest of them, but I got a percentage.

Q. You got what?

A. A percentage of the games.

Q. Of the winnings?

A. Yes, sir. For a while there was three or four of us, and I got twenty-five per cent, and later I got half, besides my wages.

Q. Were you getting half in April?

A. Yes, sir; I was.

Q. When you cashed this check of Lyons, did you pay Moore [384] half of the \$800?

A. I paid Bill Bowers half. Bill Bowers had the gambling.

Q. When did you pay him his half, before or after you cashed the check?

A. Afterwards. He had something like \$600 or \$800 he cashed too. I think it was \$600, from the same man, besides some cash.

Q. Did you have an interest in that?

A. Yes, sir.

Q. And was it all in a game you and Lyons had been in? A. Yes, sir.

Q. When did you give Bowers the \$400?

A. It was when I cashed the check at that time that he took half, after the expense was paid.

Q. You cashed the check Saturday the 8th of April. When did you pay Bowers?

A. I wouldn't say for sure.

Q. Did you pay him between then and Wednesday, the 12th?

(Testimony of George Clayton.)

A. Yes, sir, I did, but he cashed \$600, I believe, too.

Q. Did you pay him between that Saturday, the 8th and—did you pay Bowers his \$400 between the 8th and the 12th of April, when you deposited the \$1050? A. That is right.

Q. And you did pay him between those dates?

A. That is right. And there was some cash besides the check. [385]

Q. When you gave Caplan the deed on June 2nd, did you tell him Shirley had a deed to the place? A. Yes, sir.

Q. And she had a \$1250 interest in the place?

A. Yes, sir; that is right. And I also told him she had not recorded her deed, and he took the deed, anyway.

Q. What bond are you under?

A. Ten thousand dollars.

Q. Is that the only security you gave Caplan?

A. I gave him my car—the title to my car.

Q. What time of day did you say Robert and Bunny Doores came to your house on November 20th?

A. It was in the morning. I would say sometime in the forenoon, 10:00 or 11:00 o'clock.

Q. How was Bunny dressed?

A. He had on—I believe a sport jacket. In fact, I didn't pay much attention to his dress.

Q. Was he dressed for the street or for work?

A. He was dressed up for the street.

(Testimony of George Clayton.)

Q. When you went down to Pasco on the first trip can you tell us again what date that was?

A. Well, I couldn't tell you the date.

Q. And is that the time that you say you took \$2000 to buy a place at Pasco?

A. The first trip? [386]

Q. Yes. A. No.

Q. When you went down on the second occasion what date was it?

A. That was the last of April.

Q. Do you have any idea when the first trip was?

A. I was kind of intoxicated on the first trip—we practically all was.

Q. You went down to look for a place on the first trip, did you not? A. No, sir.

Q. What was your purpose in going to Pasco?

A. I don't know; just to see what it looked like.

Q. You and Kelly and this lady, Rita—What was her name?

A. I don't know what her name was.

Q. You said it on the direct examination.

Mr. Smith: I said it.

Q. How long did you stay in Pasco on the first trip? A. One or two nights.

Q. And you did not do anything about looking at a place to buy when you were on the first trip?

A. No, sir.

Q. When did you decide to buy a place at Pasco?

(Testimony of George Clayton.)

A. Well, it was when I quit down here at Moore's Club, which was about the latter part of April.

Q. You quit Moore's the middle or latter part of April? [387] A. Something like that.

Q. And did you have any other place or work to go to when you quit Moore's?

A. I had other things in mind. I wanted to get a place of my own.

Q. You did not have any money to buy a place of your own, did you?

A. I borrowed \$2000, and I had a thousand or \$1500 myself.

Q. You were going to borrow money to buy a place of your own? A. Yes, sir.

Q. From your mother? A. Yes, sir.

Q. Did you find any place in Pasco you wanted to buy?

A. Yes, sir; but they wanted too much money for it.

Q. From the 30th of December, 1943, did Shirley live at your home from then on until the end of April? A. The 30th of December, 1943?

Q. Yes. A. I don't believe so.

Q. Where did she live?

A. Well, she was here and there.

Q. Do you know where she lived?

A. No, I don't. She would be gone for a month or three weeks, and come back and stay one night, and be gone again.

(Testimony of George Clayton.)

Q. Do you know whether or not she was living in Spokane the [388] 30th of December, and through the month of January—the 30th of December, 1943, and January, 1944?

A. She might have been here. I couldn't say for sure, because she was going and coming so much I couldn't say for sure.

Q. In February did she live in the house on Carlisle Avenue? A. She was here in February sometime.

Q. And do you know when she lived there with you—lived at the house?

A. I couldn't say for sure what the date was.

Q. Was it the early part of February or the latter part?

A. I don't believe she was here around the first part. I couldn't say for sure.

Q. In March did she live at the house on Carlisle?

A. She was here for a day or so, I believe, in March.

Q. In April did she live at the house on Carlisle Avenue?

A. Yes, sir. She was here in the first part of April.

Q. And did you live there? A. Yes, sir.

Q. All the time you lived there?

A. Not all the time. Let me see. Up until I took that trip to Pasco, about the 20th or 21st of April, I was there, I believe.

(Testimony of George Clayton.)

Q. Right straight through from the preceding year? A. What do you mean by that? [389]

Q. Did you live there continuously except for the trip to Pasco?

A. Yes, sir. When I was here I lived there, yes.

Q. Shirley kept all her clothes and personal effects at the house all the time during from September, 1943, on until May of this year?

A. When Shirley left she would take a suit case or two. She has got about eight trunks of clothes, and she would take what she wanted, and she would leave. The rest of her clothes was there, yes.

Q. When did you first meet Ed Kelly?

A. Well, somebody hired Ed Kelly.

Q. Approximately when?

A. I am not sure, but I think it was sometime in 1943, in the fall, or something like that—No, I will take that back. It was in the summer. But he wasn't working at our place then. I saw him, but he wasn't working there. I don't know the date.

Q. Do you know about when he went to work at Moore's?

A. I wouldn't say for sure. Bill Ballard—

Q. Have you any idea when you first—I mean approximately—I am not asking for an exact date—about when it was, if you can now remember, when you first noticed Kelly at Moore's as a booster, I think you called him?

A. I would know, but I have forgot, to be sure.

(Testimony of George Clayton.)

Whether he [390] started in the summer to work or the fall has slipped my mind.

Q. Of 1943? A. I think so.

Q. The summer or fall of 1943?

A. There was so many people working there, and coming and going, that I can't remember.

Q. Was Bunny living at your house during the fall of 1943?

A. Yes, sir. He would come—I believe in November sometime.

Q. Did he continue to live there for a couple of months?

A. He lived there until along in February.

Q. Then did Bunny go to work at Moore's, too?

A. Yes, sir.

Q. About when was that?

A. He didn't do much work. He was there part of the time.

Q. What work was he doing?

A. He was a booster in a poker game when he was there.

Q. Did Bunny and Kelly work there at the same time? A. Well, I believe they did.

Q. When was the first time that the two of them were at your home together that you can now recall?

A. I think the first time they come out there was in January.

Q. They came out together? A. Yes, sir.

Q. Was Shirley there then? [391]

A. I wouldn't say for sure. Bunny had a key

(Testimony of George Clayton.)

to the house and when he wasn't working he would take my car and go to the house.

Q. I am only talking about Kelly and Bunny being there together when you were there. I assume you don't know when you were not there. At the times you were there do you say that Bunny and Kelly came there in January?

A. They was there several times.

Q. When you were there?

A. Yes, sir. And I think they were there when I was there twice.

Q. Several times?

A. Once or twice, I believe.

Q. Is it several times or once or twice?

A. I can't just remember.

Q. And were you working at Moore's also?

A. Yes, sir, I was.

Q. As a matter of fact the three of you were quite intimate friends—you, Bunny and Kelly?

A. Well, I didn't know Kelly too well. He worked at the place. I thought a whole lot of Bunny up to the time he did what he did regarding the ring.

Q. You were fairly intimate friends, the three of you? Were you or were you not?

A. Bunny and I was friends. [392]

Q. And you and Kelly were friendly?

A. I didn't know Kelly so well.

Q. He worked at the same place where you operated the games? A. Yes, sir.

(Testimony of George Clayton.)

Q. And he sat in the games with you as a booster when you played? A. A few times.

Q. More than a few times? A couple of dozen times? A. It could be.

Q. What is a booster.

A. A booster is a person that sits in the poker game when there is no live players.

Q. And plays for the house?

A. That is right.

Q. You say you don't know whether or not Shirley left the house early on the morning of Monday the 10th of April to go anywhere on a bus? A. No, I don't.

Q. Were you home that morning?

A. The 10th of April?

Q. Yes. A. I believe I was.

Q. Did you see Shirley that morning?

A. No, I didn't.

Q. Did you see Bunny? [393] A. No.

Q. What was the occasion you have referred to when you say you were out in the yard and Bunny and Kelly came to your home? A. Well—

Q. When was that?

A. That was sometime in May—the first part. I was out in the yard, and I heard loud talking in the house, and Shirley came to the back door and called me in the house. Do you want me to explain?

Q. Yes.

A. When I came in the house Kelly was sitting there and Shirley here (indicating), and Bunny

(Testimony of George Clayton.)

was standing by the door, and nobody was saying nothing. I wondered where the loud talking was coming from, but I could see something was wrong, and Bunny said, "We might as well go, Kelly; we won't get anything out of that \$14,000; we might as well go," and Kelly said, "There will be something done about it," and Bunny said, "I can do some squawking long and loud" and he went out the door.

The Court: What did Shirley call you in for?

A. I don't know. I heard loud talking, and she came and called me and said, "Come in here quick." I couldn't imagine what it was, and after they left I said, "Shirley, what is this?" She seemed to be peeved and she said, [394] "It is none of your business, and it doesn't concern you, and it doesn't make any difference," and she started saying something about her brother swearing, or something like that.

Q. You recognized their voices?

A. No, sir.

Q. You had not seen them enter the house?

A. No, sir. I was in the garden.

Q. Did you ever talk with Shirley as to how she made her money—your common law wife—how she made her money? A. No, I didn't.

Q. You say she gave you \$1250 for this deed that is in front of you? A. That is right.

Q. In what form was that given you?

A. In fifty dollar bills.

(Testimony of George Clayton.)

Q. All of it fifty dollar bills?

A. That is right.

Q. Did you ask her where she got that amount of money? A. I did.

Q. What did she tell you?

A. She told me a friend of hers named Al Lindley had sold some property and she had the money.

Q. A friend named Al Lindley had sold Shirley's property? A. His property. [395]

Q. How did she get that amount of money from him?

A. I don't know. He was supposed to be a friend of hers.

Q. Didn't you ask her about it? She was your common law wife for five years.

A. She doesn't tell me much.

Q. Did you ask her?

A. Yes, sir. She said she got the money from Al Lindley.

Q. What did she tell you it was for?

A. He was supposed to have sold his property and gave Shirley the money.

Q. Did you ask her what he gave it to her for, or why he gave her \$1250?

A. She wouldn't tell me.

Q. You didn't ask her?

A. I asked her where she got the money.

Q. When did Bunny quit working at Moore's card room?

(Testimony of George Clayton.)

A. Bunny didn't work there very much. He would come down and work one night and then he would be gone a couple or three nights and he would come back and say, "Can I sit down?" and he never worked very much; one, two or three days a week, something like that. Then he was tending bar. I believe he quit and went to tending bar some place.

Q. Do you have a safe deposit box?

A. No, sir; I don't.

Mr. Connelly: That is all. [396]

#### Redirect Examination

By Mr. Smith:

Q. Was this ring you referred to a man's ring or a woman's ring? A. It was a man's ring.

Q. You mentioned the fact you lived at the Pacific— Had you lived at the Pacific Hotel?

A. Yes, sir.

Q. Did Bunny Doores stay in a room you paid for in that hotel sometime?

A. He— After I left there I think he stayed a while in this room, and then he left the room and moved out to the house.

The Court: How long did you work at Moore's?

A. Approximately a year and a half.

Q. (Mr. Smith) Some mention was made in the cross-examination to Mr. Caplan. Will you tell us who he is?

A. He is the bondsman that put up the bond for me when I was arrested.

(Testimony of George Clayton.)

Q. He operates the Inland Bond Company?

A. Yes, sir.

Q. And you are at large on a surety bond?

A. That is right.

Q. Do you occasionally carry quite substantial sums of money on your person?

A. Yes, sir. [397]

Q. Has that been your practice for some time?

A. Yes, sir; I do.

Q. You mentioned that you gave Bill Bowers half of the money you collected and he gave you — What did he give you?

Mr. Connelly: I object as leading and suggestive, highly so.

The Court: Just ask what the situation was.

Q. (Mr. Smith) Will you explain the arrangement you had with Bill Bowers again?

A. Here was our deal. Up until along, I would say February, we had another partner in there. There was another one in on the gambling. I got twenty-five per cent then. Then along in February, March and April, I believe—I think that would be right—I got half of the proceeds.

Q. What happened to the other half?

A. Bowers got half and then he cut his part with Ed Moore.

Q. Anything that was taken in by Bowers or Ed Moore, did you get part of it?

A. I had nothing to do with the front end—with the beer.

Q. I mean in the back.

A. Yes, sir.

(Testimony of George Clayton.)

Q. What part of that did you get?

A. Whatever money was taken in in the back end I got half.

Q. Do you recall on this occasion before the 12th of April when you made the deposit of \$1050, where the money came [398] from you made the deposit with?

A. Most of it was this money that this man lost in the card room, Dallas Lyons, and some other money made up the deposit of \$1050 I put in the bank.

Q. That was all in currency?

A. I believe it was.

Q. What was the amount you mentioned you believed Bill Bowers had of this man's money?

A. I can't remember, because there would be five or six hundred dollars in checks, but I think he had five or six hundred dollars that he cashed the next day, or on the shift that I wasn't there.

The Court: He lost about \$1800?

A. Something like that.

Mr. Smith: I think that is all.

#### Recross Examination

By Mr. Connelly:

Q. You played with this man Lyons and he lost this money? A. I played the first night.

Q. How much did you win from him?

A. I don't recall. I think it was around three or four hundred dollars, is what I win.

Q. And then you played again?

(Testimony of George Clayton.)

A. He played next day— No, I think he played — I wouldn't [399] say whether I played the last day or the first day.

Q. The only checks you took up to cash were the ones you got from Lyons?

A. That was on my shift.

Q. And you didn't get any other checks from Bowers or anyone else when you went up to cash these checks?

A. I had \$800 in \$100 checks.

Q. Why didn't you take all the checks that Lyons lost there?

A. This was on my shift. The next day I didn't have anything to do with it. I think they took about \$600.

Q. Do you gamble there on Sunday, too?

A. Friday was the night I played, I think, because we played two days and then there was another day or so before we played again.

Q. Did you play on Monday?

A. Yes, sir, in the back room.

Q. And you took the checks Lyons gave you and took Lyons to the bank with you to cash them?

A. Yes, sir.

Q. The first day was Saturday, May the 8th?

A. I couldn't say. Maybe it was Saturday.

Q. Was Lyons drunk when he wrote the checks?

A. No. He had been drinking, but he wasn't drunk. He went with me to the bank.

Q. I say, when he wrote the checks and put his signature on [400] them was he drunk then?

(Testimony of George Clayton.)

A. No, sir; he wasn't drunk.

Q. The banker did require that the three Lyons checks be written over again—That is, the fourth check to be written for the total of the three you presented?

A. It seems to me they was wrote out with a lead pencil or the checks had had water or beer spilled on them, but there was something that wasn't right, and Lyons went with me and made out another check for the whole amount, and I cashed that.

Q. He did that at the bank after the banker had suggested it? A. Yes, sir.

Q. The banker said he had been drinking and his signature wasn't legible?

A. There was something misspelled. I don't know what it was.

(Short recess.)

The Court: Why not call Mr. Berkey and get through with him.

Mr. Smith: Yes, I will do that, Your Honor.

---

HARRISON N. BERKEY,

called as a witness by the Defendant, first duly sworn, testified as follows:

Direct Examination

By Mr. Smith:

Q. Will you state your name. [401]

A. Harrison N. Berkey.

(Testimony of Harrison N. Berkey.)

Q. What is your profession?

A. Lawyer.

Q. Where have you your offices?

A. In the Sherwood Building.

Q. Are you regularly admitted to practice law in this state? A. I am.

Q. How long have you practiced here?

The Court: Will you admit Mr. Berkey's qualifications?

Mr. Connelly: I certainly do.

Q. (Mr. Smith): How long have you practiced here?

A. About twenty-four years.

Q. Have you any personal acquaintance with George Clayton, this gentleman sitting here in the brown suit?

A. I think so. He was in the office one time.

Q. Did you have any acquaintance with him before that? A. I have not.

Q. Have you had any contact with him since until today? A. No, sir.

Q. I am handing you defendant's Exhibit "F," and I will ask you to examine that document and state if you prepared it.

A. Yes, sir. I prepared this document on May 16th and Mr. Clayton signed it in my office and I notaried it.

Q. Did you deliver the document to him? [402]

A. I did.

Q. Was he alone when he came to your office to get it? A. Yes, sir.

(Testimony of Harrison N. Berkey.)

Mr. Smith: You may cross-examine.

#### Cross-Examination

By Mr. Connelly:

Q. He stated the consideration to you that you put in the deed? A. Yes, sir.

Mr. Connelly: That is all.

(Witness excused.)

---

#### GEORGE CLAYTON,

recalled as a witness in his own behalf, further testified as follows:

#### Redirect Examination

By Mr. Smith:

Q. Will you endeavor with a little more particularity to give or fix the date that this incident concerning the ring there between you and Bunny Doores took place at your house? Fix the time as near as you can.

A. Well, I know it was February the first part --around the 10th or 12, probably. Because—I am sure it was around there, because he had been in Montana and had been back a day or two.

Mr. Smith: That is all. [403]

#### Recross Examination

By Mr. Connelly:

Q. What has happened since you testified before the recess that refreshes your recollection?

A. What do you mean?

(Testimony of George Clayton.)

Q. What has brought to your memory now that makes you sure it was the 10th, when before recess you said about the first of February?

A. The first part of February. I am sure it was the first part of February.

Q. Was your attention called to the fact there was a letter which purports to have been written from Montana by Bunny on February 2nd?

A. No, sir.

Q. Have you always had the name of Clayton?

A. Part of the time.

Q. What other name have you had?

A. What do you mean by that?

Q. You say part of the time?

A. I thought you said the ring.

Q. Have you always had the name of Clayton?

A. No, sir. I had my name changed.

Q. When did you have it changed?

A. I think it was two years ago.

Q. You started to tell me the hotel you and Shirley had [404] lived together at, and you mentioned the Pacific and the Gatewood in Seattle. What other hotels during the five years have you lived at?

Mr. Smith: I object as immaterial and incompetent.

The Court: I will overrule the objection.

Mr. Smith: There is also another matter I desire to call to the attention of the court at the bench.

(The following discussion was then had between Court and Counsel at the Court's bench, without the hearing of the jury, to-wit:)

(Testimony of George Clayton.)

Mr. Smith: I have never asked this question of the witness, and I don't know what his answer would be, but suppose the question should elicit the fact that at sometime they have lived in hotels outside the State of Washington, which would show the commission of a separate and distinct crime, which would have no relation to this matter.

Mr. Connelly: I think Your Honor ruled on that same thing in another case. It is the same situation.

The Court: All right.

(The trial was then resumed in open court in the presence and hearing of the jury, as follows, *to-wit:*)

The Court: Mr. Clayton, if in response to this question there should occur to you any instances outside the State of Washington, you are advised you have the right to refuse to answer the question, on the ground it might [405] incriminate you. Mr. Smith has no information one way or the other, and I do not want the jury to infer that because I give you this warning I have any idea you have ever lived with her outside the State of Washington, but if there are any such instances you do not need to answer that.

Q. (Mr. Connelly): What other hotels have you lived at besides the Gatewood and the Pacific in the last five years?

A. We lived here and in Seattle is all. We never did live out of the state.

(Testimony of George Clayton.)

Q. I didn't ask you that.

The Court: That is all right. You could not be compelled to testify to it if you had.

A. We lived at the Atwood. I had a room there.

Q. I am only asking where you and Shirley lived together. A. The Atwood.

Q. Here?

A. Seattle. And the Gatewood Hotel; we had two rooms there.

Q. And what others?

A. I believe that is all.

Q. Is the Pacific the only hotel you lived together in in Spokane?

A. Yes, sir. I had a room at the Pacific Hotel for a year and a half or longer.

Q. And she lived with you during that time?

[406]

A. When she was here.

Q. What was your name before you changed it?

A. My father's name was Gunn.

Q. And you changed it in 1942?

A. I think that was when it was.

Q. On that occasion when you said Kelly came in at sixty miles an hour, he said to you and Shirley, "Have the bulls been out here?"

A. He said that, if the bulls had been out here.

Q. And he said, "We are all going to be arrested?" A. He told Shirley that.

Q. He said, "We are all going to be arrested?"

A. Yes, sir.

Q. And you were there? A. Yes, sir.

(Testimony of George Clayton.)

Q. And he addressed you? A. Yes, sir.

Q. And he was frightened and came in at sixty miles an hour? A. Yes, sir.

Q. And he said, "We are all going to the Pen?"

A. I don't think he said anything about the Pen. He said, "Bunny called me up awhile ago and said to get on the train and get out of the country. You are going to be arrested, Shirley is going to be arrested and George is going to be arrested" and he said, "Anderson and Albright [407] is going to arrest us," and I said, "What am I going to be arrested for?" and he said, "Bunny said if Shirley is going to the Pen George might as well go, too, because I don't like him."

Q. What else did he say?

A. Then Shirley said something. I don't remember what she did say, but she said, "Kelly, we have got to go to Coeur d'Alene." She got him in the bedroom, and they talked there, and she was flying around and said, "We have got to go to Coeur d'Alene."

Q. Kelly appeared to be very frightened?

A. Yes, sir.

Q. And he did not make any threats toward you at that time? A. No, sir; not to me.

Q. He never did threaten you, did he?

A. Not that I know of. I don't know what for.

Q. But he never did threaten you?

A. No, sir. He never threatened me. He spoke up and he said—He told Shirley, he said, "I don't know whether Bunny has double-crossed me or

(Testimony of George Clayton.)

given me the run-around or whether he has stooled on us," and he said, "If I thought he had stooled on me I would go down to my room—" I believe he said, "and get my gun and kill him."

Q. But when he said "Have the bulls been out here?" he asked you? [408]

A. I answered the question.

Q. You answered it that he addressed you?

A. He said that as he came in the door.

Q. And you answered it?

A. I said, "What bulls? What for?" and he said, "That Coeur d'Alene proposition."

Q. Did you deposit your earnings or winnings every day in the bank account?

A. Well, most of them, I guess. Not all of the money. I kept some and put some in the bank.

Q. Did you deposit your earnings or winnings before you would cut it up with Bowers, or did you deposit it and then give Bowers a check, or how did you handle that?

A. No. We cut the money and I would bank my money around a few days, or deposit what I had.

Q. I take it you deposited only what you made finally net gambling?

A. You mean all I made—I don't quite understand.

Q. That is what I am asking you, if you deposited your own share of winnings after you cut it up with Bowers, or did you first deposit all you would take in and later cut it up with Bowers?

(Testimony of George Clayton.)

A. No, sir; I just deposited my own money.

Q. And where did you and Bowers make the split of the winnings? [409]

A. In the office.

Q. Did Bowers have anything to do with the gambling end of the business?

A. He was the business man.

Q. Who had the front end?

A. Ed Moore and Ed Wilkes, when I first went there, and later Bill Bowers was there and with him and Ed Moore they got a quarter each.

Q. And you got half? A. Yes, sir.

Q. You had control of the games?

A. No. I didn't have control of them. I got a percentage.

Q. You got fifty per cent?

A. When we first started there was another man and I got twenty-five per cent besides my wages.

Q. You got wages all the time you worked there? A. Yes, sir.

Q. How much?

A. Five dollars a day besides percentage.

Q. What did you do with checks you would take in winnings? Did you cash those or deposit them and then split with Bowers?

A. I generally cashed them.

Q. Are these checks which you deposited winnings from gambling? [410] A. Which ones?

Q. These you have marked on your deposit slip for September 29, 1943, a \$145 check?

A. I think that was money.

(Testimony of George Clayton.)

Q. It says "check." It is in the check column.

A. It could be a check, yes, sir.

Q. And the next one, October 7, 1943, \$150, is currency? A. Yes, sir.

Q. And October 20, 1943, deposit \$200, currency, and fifty-six dollars in checks? A. Yes, sir.

Q. And November 17, 1943, you deposited \$200 in currency? And on December 8, 1943, you deposited \$215 in currency, thirty-five dollars checks?

A. This was in bills, currency, and silver.

Q. It says checks and is totaled up.

A. Yes, sir. This is the currency and this is the check.

Q. And December 13th, deposited \$100 currency and twenty dollars check, or checks?

A. Yes, sir.

Q. December 22nd you deposited checks in total \$88.48—No, currency or silver? A. Yes, sir.

Q. January 21, 1943, deposit ninety-five dollars currency, five dollars check? [411]

The Court: Is that 1943 or 1944?

Mr. Connelly: It says 1943, but the typed portion says 1944.

Q. On February 1, 1944, you deposited \$400 in currency and checks \$34.24 and \$10?

A. Yes, sir.

Q. And February 11, 1944, currency \$150 and checks \$65.35 and \$44.49? A. Yes, sir.

Q. On February 24, 1944, you deposited \$120 currency? A. Yes, sir.

(Testimony of George Clayton.)

Q. And on February 28, 1944, you deposited \$500 in currency. And on April 2nd—you testified about this—you deposited \$1050 currency, and May 5th you deposited \$2000 in currency?

A. Yes, sir.

Q. My question is, did you cut up the checks that were secured from winnings or gambling down there at Moore's before or after you deposited them?

A. Lots of times if there was some checks, I would take the checks and deposit them and give his cut in money out of my pocket, and I would take the checks and deposit them, because he never done no banking business—Bowers didn't.

Q. He did no banking business?

A. No, sir. [412]

Q. And you had to deposit all the checks?

A. Not necessarily. Sometimes he would take checks and cash them.

Q. If they were on local banks?

A. Yes, sir.

Q. And if not you would deposit them?

A. I would cash them.

Q. Did you pay him before you deposited them or after?

A. It would just depend. I don't know, because I guess before or after, just depending on the time of day or night.

Q. Who kept track of it?

A. We kept it in the office.

Q. You kept books?

(Testimony of George Clayton.)

A. I don't know whether he did or not.

Q. Did you?

A. No, sir; I didn't. But we would just split it up.

Q. Did you deposit all the winnings in your bank account at any time down there?

A. No, sir.

Q. Both checks and money?

A. No, sir, just my cut, my percentage, my own.

Q. When did you get this \$2000 from your mother? A. Well, I believe the 20th of April.

Q. In what form did you get it?

A. In twenty dollar bills. [413]

Q. What did you do with them between the 20th of April and the first of May when you put them in the bank?

A. Well, I had the money with me when I went to Pasco. I was gone approximately a week, and I packed the money, and I believe when I come back I might have had the money a day or so in my pocket before I deposited it. I am not sure; a few days, possibly.

Q. What bank did your mother get the money out of?

A. I don't know. I don't think she does any banking.

Mr. Connelly: I think that is all.

Mr. Smith: That is all.

(Witness excused.)

(Whereupon, an adjournment was had to the hour of 1:15 o'clock p.m., December 11, 1944, at which time, all parties being present

as heretofore, including all the jury, the trial was resumed as follows, to-wit:) [414]

(Pursuant to adjournment, the court reconvened at the hour of 1:15 o'clock p.m., December 11, 1944, at which time, all parties being present as heretofore, including all the jury, the trial was resumed as follows, to-wit:)

Mr. Connelly: May I ask Mr. Clayton a few more questions on cross-examination? I had no opportunity to check my notes at the last session of the court.

The Court: All right.

---

### GEORGE CLAYTON,

recalled as a witness in his own behalf, further testified as follows:

#### Cross-Examination

By Mr. Connelly:

Q. Will you tell us again the month that you say Shirley was away from here in Montana or Dakota?

A. As near as I can tell—I wouldn't know the exact date—but I think it was in January or maybe the latter part of December.

Q. I understood you to say she was away three months or three months and a half.

A. I am sure it was two months or something like that.

Q. Do you know when she came back?

(Testimony of George Clayton.)

A. She came back the latter part of January or the first of Feburary.

Q. Where was she living in the month of Janu-  
ary? A. I couldn't tell you. [415]

Q. Was she here from September, or through September, October, November and December, 1943?

A. I couldn't tell you. She was on various trips all the time.

Q. Do you know of her receiving any treatment from Dr. Bailey at Millwood during that time?

Mr. Smith: We object to that as being improper cross-examination. It is entriely outside the scope of the direct.

The Court: Yes, I think so, Mr. Connelly.

Mr. Connelly: He had not fixed the time, but he has fixed it now.

The Court: If it is for the purpose of fixing the time, you want to call his attention to concerning certain things, that is permissible, even though it has not been gone into on the direct examination, but he answered your question "No," so I think I will let the answer stand and not let you pursue it any further. I will only let it stand on the theory it might call his attention to certain things in the same way he would say he remembered she bought a certain piece of furniture, to call it to his attention in fixing a date. That is important here. That is the only reason I will let the question and answer stand at all.

(Testimony of George Clayton.)

Q. (Mr. Connelly): Did you ever drive her out to Dr. Bailey's [416] office?

Mr. Smith: The same objection.

Q. (Mr. Connelly): Did you let Shirley use your car during June, July, August, or September of 1943?

Mr. Smith: That is objected to.

The Court: The objection is sustained. I only let you ask the question on the theory it might recall something that happened last fall or during January or February of this year. With reference to dates that far back I will sustain the objection and strike all of the questions and instruct the jury to disregard them.

Q. (Mr. Connelly): Do you recall that you stated on direct examination that Shirley was not at home when Bunny came to live with you in October, 1943?

A. She was home when he come.

Q. And she remained home after he was there and lived there with you?

A. No, sir. She was on trips and he stayed with me for a long time. I don't know just how long it was.

Q. Was she on any trips other than the one to Montana in the latter part of December or January, that you have referred to?

A. I couldn't say. She never told me where she went.

Q. Was she away?

(Testimony of George Clayton.)

A. I am sure she was away for a period of two months. [417]

Q. And those are the two months you referred to as a part of December and a part of January?

A. I am sure it was.

Q. Was she at home all the rest of the time from the time Bunny came in October? A. No, No.

Q. Where was she?

A. I couldn't tell you.

Q. Was she in Spokane?

A. I don't think so. She might have been here some of the time; back and forth.

Q. Did you see her during that time?

A. It seems to me she took a trip to Seattle--or said she went to Seattle--and I think she was here a day or so, but I don't know what the day was.

Q. Did she continue to keep her clothing and personnel effects at your home during that time?

A. A part of her stuff, what she didn't take. I think she had a couple of suitcases with her.

Mr. Connelly: That is all.

#### Redirect Examination

By Mr. Smith:

Q. This may not be proper redirect examination on this examination, but I want to ask you in reference to the [418] question Mr. Connelly asked you Friday about this change of name. About when was it, to your best recollection, that you had your name changed, about how long ago?

A. You have it there; I think it was two years ago.

(Testimony of George Clayton.)

Q. That was by petition to the Supreme Court of this county? A. Yes, sir.

Q. And for how a time prior to that had you been using the name of George Clayton?

A. Oh, ever since, I think, my mother and dad was married.

Q. Mr. Clayton was married to your mother?

A. Yes, sir.

Q. And that would be how many years ago?

A. I couldn't tell you.

Mr. Smith: That is all.

Mr. Connelly: That is all.

(Witness excused.)

---

AMANDA VICTORIA CLAYTON,  
called as a witness for the Defendants, first duly  
sworn, testified as follows:

By Mr. Smith:

Q. State your name, please.

A. Amanda Victoria Clayton.

Q. You live in Spokane?

A. Yes, sir. I have lived in Spokane off and on all my life, [419] about sixty years.

Q. And what relationship are you to George Clayton? A. He is my son.

Q. How many other children do you have?

A. Just one.

Q. One other son? A. Yes, sir.

(Testimony of Amanda Victoria Clayton.)

Q. Were you formerly married to a man named Gunn? A. Yes, sir.

Q. Who was George Clayton's father?

A. Mr. Gunn.

Q. And was he likewise the father of your other son? A. Yes, sir.

Q. You and Mr. Gunn are not married now?

A. No.

Q. Whom are you now married to?

A. Mr. Clayton.

Q. What is his name?

A. Earl H. Clayton.

Q. How many years have you been married?

A. To Mr. Clayton?

Q. Yes.

A. About twenty - five — near twenty - five — we were married in 1920.

Q. To your personal knowledge, has your son George used the [420] name of George Clayton for a number of years? A. Yes, sir.

Q. To your personal knowledge, did he change his name, have it legally changed from Gunn to Clayton?

A. Yes, sir. That was my wish.

Q. Directing your attention now to an occasion in the spring of this year, sometime in April or May, I will ask you to state whether or not you loaned your son George Clayton any sum of money?

A. Yes, I did.

Q. How much money did you loan him?

A. I loaned him \$2000.

(Testimony of Amanda Victoria Clayton.)

Q. And on what date did you make that loan to him, to the best of your recollection?

A. It was week or ten days after Easter. I remember that very distinctly—about the 20th.

The Court: Of April?

A. Yes, of April.

Q. (Mr. Smith): Do you remember what date in April Easter was last year?

A. Either the 8th or 9th, or the 7th, 8th or 9th; something like that. I don't remember distinctly.

Mr. Smith: You may cross-examine.

Mr. Connelly: No questions.

(Witness excused.) [421]

---

### ROBERT DOORES,

called as a witness for the Defendant, first duly sworn, testified as follows:

#### Direct Examination

By Mr. Smith:

Q. Will you state your name, please, to the Court and jury. A. Robert Doores.

Q. What relationship are you, of any, to Shirley Doores and Wesley or Bunny Doores?

A. I am a brother.

Q. Are you older than both Shirley and Wesley?

A. Yes, I am.

Q. Where is your home?

A. Well, I haven't exactly got a home—what you would call a permanent home. I have been fol-

(Testimony of Robert Doores.)

l owing construction work since the war. I have a trailer house I live in on these construction jobs.

Q. Whom have you been employed by in recent years?

A. I have worked for several companies in the last five or six years. I worked for Morris & Knudson the biggest part of the time.

Q. What kind of work do you do?

A. I am a combination man, on heavy equipment, shovel work and drag line, and a cat skinner, running a blade on the highway, heavy Diesel equipment.

Q. Do you work steadily?

A. Yes, sir; I do. [422]

Q. Are you a married man?

A. Yes, I am.

Q. Have you ever been convicted of a felony at any time? A. I have never.

Q. How long have you known the defendant, George Clayton?

A. Well, I have known him since about a year now. It has been about a year I was in Spokane here and I stopped and visited Shirley a day or so and I met Mr. Clayton while I was here.

Q. Is that the first time you saw him?

A. Yes, sir.

Q. And the only time until you came here recently? A. That is right.

Q. When did you come to Spokane on this occasion?

A. I came in here the 17th of November.

(Testimony of Robert Doores.)

Q. When you came here where did you come from?

A. Montana. I had been up there visiting some friends and my sister.

Q. Were you on your way from Montana to Spokane?

A. Well, I was going back to Portland, where I work. I belong to No. 701, operating engineers.

Q. When you came into Spokane on the 17th of November where did you go, first?

A. When I came into Spokane I was trying to find Shirley, my sister, and I couldn't locate her. She was out of town, [423] and somebody said she was down on the Coast someplace, and then I tried to find Clayton and he was also out of town, and I finally found my brother, Bunny Doores, at the Pacific Hotel.

Q. When did you go to the Pacific Hotel at that time?

A. It was that evening. I got in here about 10:30, I guess, the night of the 17th, and about midnight was the time I found out where Bunny was, and it was a little after midnight by the time I got up to the hotel.

Q. Did you attempt to register for a room at the Pacific Hotel? A. Yes, sir.

Q. Could you get one?

A. No, sir; there was no vacancy.

Q. Did you put in an application for a room there? A. I did.

(Testimony of Robert Doores.)

Q. What did you do, then, for accommodations that night?

A. I stayed with my brother, Bunny Doores.

Q. What room did he have at the Pacific Hotel?

A. If I remember right, the number of his room was 248.

Q. What did you and he do that evening after you found him?

A. Well, we went to bed early. He had just come in from work. He worked at this aluminum plant, I guess, and he had just come in from work, and he changed his clothes and we went down to the Rockaway Cafe and had some supper. [424]

Q. Did you go with him?

A. Yes, sir; I did.

Q. And after you came back where did you go—or after you finished eating where did you go?

A. We came right back to the room at the hotel.

Q. You stayed with him that night, did you?

A. Yes, sir.

Q. That evening after you returned to his room, 248, at the Pacific Hotel, or I should say in the early morning, did you have any conversation with your brother, Bunny, about this case?

A. Yes, sir. We talked about it.

Q. Will you state whether or not you asked him anything about the case.

A. Yes. I asked him about it.

Q. Will you state just exactly what the conversation was between you and Bunny Doores.

Mr. Connelly: That is objected to.

(Testimony of Robert Doores.)

The Court: You will have to ask the question in the same form.

Q. (Mr. Smith): Mr. Doores, on that occasion which I have referred to, I will ask you to state whether or not the following conversation in substance and effect did not occur between you and your brother, Bunny, or Wesley Doores: That you started discussing this case, and you [425] told him you were interested in the case because of the fact that your sister, Shirley, was mixed up in it, and that he, Bunny, was mixed up in it, and in that conversation you asked him what part in the case George Clayton had played, and what he was supposed to have done, or how come he was in it, and that Bunny laughed when you asked him that, and he told you that Clayton did not have any part in the case at all; that Bunny and Kelly were framing George Clayton—did that occur?

A. Yes, sir. That is what he said.

Q. And at the same time and place I will ask you if your brother did not state that if Shirley had to go to the penitentiary on this deal, Clayton might as well go with her, and you said to him at the time that statement was made, in substance and effect, "Bunny, that doesn't seem right to me." And he said to you, "I think George kept Kelly and me from getting our share in this deal, and that is one reason we are framing him, and another reason is, I don't like him." Did that conversation occur between you and your brother, Bunny?

A. Yes, sir.

(Testimony of Robert Doores.)

Q. Did he make those statements to you?

A. Yes, sir. That is exactly what he said.

Q. And in the same conversation if your brother did not state to you, "I have to go up there to appear in court, after [426] this double-crossing has been done; I don't know how to keep from appearing. If I had the money I would leave town."?

A. That is right.

Q. And then he said to you, "How much money have you got?" And you said in substance, "I have a little money with me," and he said, "Well, do you have enough with you so you could loan me \$100?" and you said, "What do you want with it?" and he said, "I would buy a railroad ticket just as far as I could go. That would be one way of keeping from appearing up there, and I would be glad." Did he say that?

A. That is right. That is exactly what he said.

Q. Did you tell him at that time that you did not have enough money to let him have the \$100 and still be able to finish your trip, wherever you were going? A. That is right.

Q. And I will ask you to state whether or not that same occasion if he told you one reason he wanted to get out of here and leave was because he was afraid he would be sent back to Walla Walla? A. That is right.

Q. Now, Mr. Doores, directing your attention to an occasion the following—I will ask you to state what day of the following week it was that you and your brother, Bunny, [427] went down to the Turf

(Testimony of Robert Doores.)

Cafe on Main Avenue, in the morning, where you discussed something about going out to George's house?

A. That was the morning of the 21st, because it was the same afternoon I registered for a room at the hotel—the first vacancy they had—the 21st of November.

Q. While you were at that place did Bunny ask you to take him out to George's place?

Mr. Connelly: That is objected to. The question put to Bunny referred to the 20th of November.

Mr. Smith: That is true, but I think the question I asked Bunny was sufficiently inclusive so it might refer to anytime.

The Court: I will sustain the objection.

Mr. Smith: Your Honor will notice the statement "He never took me out to George's place."

The Court: Yes.

Mr. Smith I think on that basis, even though I was mistaken on the date myself when I asked the question of Bunny, that statement would permit the introduction of this evidence.

The Court: The previous answer is, "I don't know."

Mr. Smith: The answer is, "He never took me out to George's place."

Mr. Connelly: Some people use the word "never" [428] instead of "not."

The Court: I will sustain the objection.

(Testimony of Robert Doores.)

Q. (Mr. Smith): Mr. Doores, did you have a brother who died in the spring of 1944?

A. Yes, I did.

Q. What was his name?

A. Oscar Raymond Doores.

Q. Do you know the date of his death?

A. He took sick, I believe it was, on the 4th of March and died on the 5th.

Q. The 5th of March, 1944?

A. Yes, sir.

Q. Mr. Doores, did you ever take your brother, Bunny Doores, out to George Clayton's house?

A. Yes, sir, I did.

Q. What was the date you took him out there?

A. It was the 21st of November.

Q. 1944? A. Yes, sir.

Q. Were you present at a conversation between your brother and George Clayton?

A. Yes, I was.

Q. On the way back from that trip to George Clayton's house, did your brother make any statement to you concerning what he would do in the event of George Clayton's lawyer [429] cross-examining him about narcotics?

A. Yes, he did.

Q. What did he say?

Mr. Connelly: That is objected to. I do not find any question put to Bunny Doores in connection with that.

Mr. Smith: The last page.

Mr. Connelly: I will withdraw my objection.

(Testimony of Robert Doores.)

Q. (Mr. Smith): I will ask you if on that occasion he did not state to you if the lawyer started cross-examining him about narcotics or if he used dope, he would tell him all the dope he used he got from George Clayton?

Mr. Connelly: That is objected to for another reason. It is not competent, relevant nor material. There is no testimony by the witness he ever got any narcotics from George Clayton.

The Court: The objection is overruled.

Q. (Mr. Smith): You may answer.

A. That is right. That is what he told me.

Q. And I will ask you if the night before this trip you have referred to, around 7:00 o'clock in the evening, at the hotel room, that you were talking about the case, and that Bunny—You stated to Bunny that you felt sorry for all of them to be mixed up in a deal like that, and it looked very bad, and you stated to him, "Bunny, I can't figure out for the life of me how George got mixed up in this. [430] He must have had something to do with it or he would not be mixed up in it." And Bunny said to you, "He didn't have anything to do with it. When they came out to pinch him he didn't know what they were pinching him for."?

A. That is right. That is what he said.

Mr. Smith: May I ask about this, in the middle of Page 6, again, Your Honor, a further statement about that trip, where he says, "I never was out to see George at all"?

The Court: I haven't ruled on your right to

(Testimony of Robert Doores.)

cross-examine on anything that may have occurred out there. I think that the answers you pointed out to me have covered that, but it did not cover the previous conversation on which there was a statement made.

Q. (Mr. Smith): On this trip that you have referred to on the 21st of November, out to George Clayton's house, I will ask you whether or not you did not get out of the car and go to the door and knock, and George hollered for you to come in, and when you and your brother, Bunny, went in he was lying on the couch—that George was lying on the couch because his leg was hurting him—and as soon as you walked in, George said to Bunny, "What do you want here, Bunny?" and Bunny said, "I have come out to talk to you, George." And George said, "I don't want to talk to you" and Bunny said, "Now, George, I am sorry everything has [431] happened as it has, and I am trying to get you squared off, if you will let me talk long enough to explain it" and Bunny asked George for a loan of money and stated he would leave, because he and Kelly were framing him. Did that occur?

A. That is right.

Mr. Connelly: That is objected to. The question was not put to the Witness Bunny in that fashion, and the date of the transaction is not the same as was given when he questioned the Witness Bunny Doores.

The Court: On the question of the date I have ruled against the Goverment, in the light of the

(Testimony of Robert Doores.)

statement that his brother never took him out, the question of one day or the other, I have ruled against the Goverment. The first part of the question is wrong, when he talked about going in the house and George lying there, that is not impeaching. He testified to that independently, and without being led. The second part of your question is not in the exact language of the question. My ruling is on the question of dates. it is all right. I will sustain the objection to the first part of your question, and when you get to the point of the impeaching question, ask it in the language of the question you put to Bunny.

Q. (Mr. Smith): When you and your brother drove out to George Clayton's house on the morning of November 21st, tell what [432] happened out there, up to the time of any conversation between Bunny and George. Tell what happened out there up to the time of the conversation. In other words, what happened when you got there?

The Court: Not what was said, but what you did.

A. We drove up to their house and we got out of the car and I went to the door and knocked, and George hollered for us to come in, and he was lying there on the couch with a pain in his leg—he couldn't hardly walk, is was bothering him so bad—and I opened the door and we both walked in.

Q. (Mr. Smith): As soon as you had walked in, I will ask you to state whether or not George said to Bunny, "What do you want here, Bunny?"?

A. That is right.

(Testimony of Robert Doores.)

Q. And Bunny said, "I have come out to talk to you, George" and George said, "I don't want to talk to you" and Bunny said, "Now, George, I am sorry everything has happened as it has and I am trying to get you squared off, if you will let me talk to you long enough to explain it."?

A. That is right.

Q. State whether or not Bunny asked George for a loan of money that he would like to have.

A. That is right.

Q. Oh, yes. And then Bunny stated to George, Clayton that [433] he knew he and Kelly were framing him?

A. Yes, sir; that is true.

Q. Oh, yes. And then Buny stated to George, "If you will loan me enough money to leave, I will guarantee you I will not be here for any trial to appear against you."? A. That is right.

Q. State whether or not George said to Bunny, "I wouldn't loan you a nickel; I wouldn't give you anything. Get out of my house and stay out."?

A. That is right.

Mr. Smith: You may cross-examine.

#### Cross Examination

By Mr. Connelly:

Q. Where did you come from when you arrived in Spokane this last time? A. Montana.

Q. And do I understand you were on your way to take work in Portland?

A. I was going back to work in Portland.

(Testimony of Robert Doores.)

Q. Where were you going back to work, what job?

A. I was going back on the Coos Bay dredging.

Q. When were you supposed to be there?

A. I was supposed to be there almost a week ago now. I should have been there. [434]

Q. You had a job on the Coos Bay dredging?

A. Yes, sir.

Q. And you left Montana to go to Portland to ship out to it? A. Yes, sir.

Q. When were you supposed to go to work, two weeks from now?

A. About. They had equipment and it had to be overhauled, and there was no definite time when we would go to work. Parts were hard to get, and you would plan on going to work on Monday and maybe you would not get no parts for two weeks.

Mr. Smith: May I ask another question before we go further?

Mr. Connelly: Yes.

#### Direct Examination (resumed)

By Mr. Smith:

Q. Mr. Doores, I want you to pay particular attention to this question: I will ask you whether or not you in a conversation with your brother, Bunny Doores, on November 29th or 30th, asked him what Shirley would probably get out of this, and you stated that you could get some money for him to go on as far as Boise, and after he got to Boise you could get some more money for him to go on East.

(Testimony of Robert Doores.)

Did you make any such a proposal or suggestion or statement to your brother? [435]

A. No, I did not.

Mr. Smith: All right, Mr. Connelly.

Cross Examination (resumed)

By Mr. Connelly:

Q. When you left Montana what city did you leave from? A. Martindale.

Q. Do your relatives live there?

A. Yes, sir.

Q. How long had you been at Martindale?

A. I had been there, I guess, I will say a week. I don't know exactly. From around a week. I visited with my sister.

Q. Was your sister, Shirley, at Martindale any time that you were there? A. No.

Q. And when you came to Spokane on the 18th of November— A. The 17th.

Q. And you got in here at 10:30 at night?

A. Something around that time.

Q. Were you driving a car?

A. Yes, sir.

Q. What effort did you make to reach your sister? Did you go out to her home?

A. I went out there. [436]

Q. To 7225 East Carlisle, in the valley?

A. Yes, sir.

Q. You had been there before?

A. I was there once.

Q. When was that?

(Testimony of Robert Doores.)

A. That was a year ago when I was there once.

Q. Did you remember the number or did you write it down or did you have a letter giving it?

A. I had been out there before, about a year ago now, not just a year ago now. I wouldn't say for sure, but it was in the first part of December.

Q. You corresponded with your sister since you have been away? A. No, sir, I haven't.

Q. Did you have her address written down somewhere? A. No.

Q. You remembered the street number?

A. I remembered the place by being out there.

Q. By being there once before. And you say you went to that house that night when you got in here?

A. Yes, sir.

Q. Whom did you see there?

A. There was no one there. The lights were out and the house was locked and when I knocked, no one answered.

Q. And then you came to town? [437]

A. Yes, sir.

Q. Where did you go when you came down town—did you go directly to the Pacific Hotel?

A. No, sir; I went in the Turf and inquired about Shirley and I asked several fellows before I found a fellow that knew her.

Q. How did you happen to go to the Turf?

A. That is—I don't know. When I was here a year ago we were in the Turf and at Moore's pool hall.

Q. Which one did you go in?

(Testimony of Robert Doores.)

A. I went in the Turf and tried to find Shirley and I couldn't find anybody in there that knew her, and I went across the street to Moore's pool hall, I guess they call it.

Q. How did you happen to go there?

A. That is where George was working when I was here a year ago.

Q. But you went to the Turf first instead of going where you knew George was working?

A. One reason I did, I parked my car right in front of the Turf and I dropped in there a minute, and I couldn't find anybody in there that knew Shirley and I went across the street.

Q. Did you find anyone over there who knew her? A. Yes, sir. [438]

Q. Were you told where she was?

A. He said he didn't know. He said as near as he knew, she was on the West Coast.

Q. Did you inquire for Clayton?

A. Yes, sir.

Q. And then you went to the Pacific Hotel?

A. Yes, sir.

Q. Was your brother in his room when you arrived at the Pacific Hotel? A. That is right.

Q. And that was about midnight?

A. Yes, sir. I would say it was a little after midnight.

Q. The fact of the matter is, is it not, that you were sent to the Pacific Hotel by George Clayton and your sister to contact Bunny and be with him and talk with him about this case? A. No.

(Testimony of Robert Doores.)

Q. You did contact him, didn't you?

A. Later when he come back to town.

Q. You contacted him that night when you went to the Pacific Hotel? A. I did not.

Q. I thought you said he was there in his room?

A. Yes, sir, Bunny. You said Clayton.

Q. You contacted Bunny? [439]

A. Yes, sir. I stayed with Bunny that night.

Q. And were you not sent to contact Bunny by your sister and George Clayton?

A. No, sir. Neither one of them was in town.

Q. Who first started talking about this case, you or Bunny?

A. I don't know which one it was.

Q. I thought you said you asked him about this case in response to a question by Mr. Smith?

A. We started talking about the case. I was interested in it because I was interested because she was in it.

Q. Where had you heard about the case?

A. I read it in the papers.

Q. The Montana papers?

A. No, sir; in the Portland papers.

Q. When was that?

A. That was, I believe, last spring, when this first happened, when this trouble first came up.

Q. You did not come up here then?

A. I was working and I couldn't get away.

Q. After you quit working you did not come here then?

A. No, sir. There was nothing I could do.

(Testimony of Robert Doores.)

Q. Did you go through Spokane to go to Montana to visit your relatives and friends?

A. No, sir.

Q. Where did you go from and how did you get to Montana? [440]

A. I went from Portland to Boise and from Boise to Montana.

The Court: When did you last hear from Bunny?

A. We don't correspond and I guess the last time I seen Bunny to talk with him was at my brother's funeral in Montana.

The Court: In March?

A. Yes, sir.

The Court: And you had no correspondence with him—Did you have correspondence with Shirley about Bunny?

A. No.

The Court: How did you know that Bunny lived at the Pacific Hotel?

A. A fellow in Moore's told me.

The Court: That was the first information you got?

A. Yes, sir: I didn't know where any of them was; when I got to the house that evening it was dark and naturally I come up town to inquire.

The Court: Go ahead.

Q. (Mr. Connelly): Did you endeavor to register for a room at the Pacific Hotel before you met Bunny, up there that night?

(Testimony of Robert Doores.)

A. No, I didn't. I thought if Shirley was in town and I could find her I would go to the house and stay with her.

Q. I understood you to say on your direct examination when you went to the Pacific Hotel you put in an application for [441] a room, but they didn't have any room? A. They didn't.

Q. And then you stayed with Bunny?

A. Yes, sir.

Q. Had you seen Bunny before you put in an application for a room?

A. Yes, sir. I talked to him. That fellow said that Shirley was out of town and I thought Bunny would know for sure where she was, and he said as near as he knew she was out of town, and I asked if I could get a room and he said, "I don't know."

Q. How long did you plan to stay here?

A. I just planned to stay here long enough to visit Shirley was all.

Q. This was on the 17 of November, and you are still here? A. I am still here.

Q. When were you subpoenaed as a witness in this case?

A. I don't know, but it was a few days ago when this trial first started.

Q. When did you first see George Clayton during your stay here, this last time?

A. Oh, as near as I can remember, it was around the 19th, I believe, something like that.

Q. Two days after you claimed you went out there? A. Something like that. [442]

(Testimony of Robert Doores.)

Q. Was that before you and Bunny drove out there? . . . A. Yes, sir.

Q. Where did you see George Clayton?

A. At the Turf.

Q. Was that by prearrangement?

A. No, sir. I went there to eat and Clayton walked in when I was eating.

Q. Did you and he discuss this case?

A. No; we did not—not at that time.

Q. Not at all?

A. No, sir. I told him I was sorry for him and the kids, to think they was tangled up, and he didn't seem to want to say anything.

Q. Didn't you tell him what Bunny told you on the night of the 17th? A. Not at that time.

Q. Why didn't you tell him?

A. Because I didn't want to get tangled up in it.

Q. You mean to say that you did not want to get tangled up in it, and you would let a man who your brother told you was innocent, and who was being framed, go on and be framed?

A. After I found out for sure he was being framed, I told him.

Q. But you knew that on the night of the 17th, did you not?

A. He didn't give me all the details and facts. After I had [443] been out to Clayton's house and come back to town and he told me what he was going to say in court, I knew he was framing Clayton. In fact, I went out to the house and told George he was framing him.

(Testimony of Robert Doores.)

Q. You just testified in response to questions by Mr. Smith that on the first night you stayed with Bunny, which was the 17th of November, that you told Bunny you were interested in the case because of the fact your sister Shirley was mixed up in it and that Bunny was mixed up in it, and in the conversation you and Bunny had you asked Bunny what part in the case George Clayton had played, and what he was supposed to have done, or how come he was in the trouble, and that Bunny laughed when you asked him that, and told you that George Clayton didn't have any part in the case, and that he and Kelly were framing Clayton.

A. Yes, sir.

Q. And when you met Clayton in the Turf two days later you did not tell him those things you claimed Bunny told you on the night of the 17th?

A. No, sir.

Q. And you did not do it because you didn't want to be inconvenienced by being mixed up in it?

A. I didn't know whether Bunny was lying about it or not. I didn't know for sure then until after I went out to [ 444] George's house, and afterwards in the car, and that bunch of lies he told me in the car, I knew then that him and Kelly were framing Clayton.

Q. Did you not think that Bunny might have been lying when he told you he was framing Clayton and that Clayton didn't have any part in it at all? A. I didn't know.

(Testimony of Robert Doores.)

Q. And you met Clayton at the Turf and visited with him and didn't tell him that?

A. Another reason I guess I didn't do it, was because there was a fellow with him, and we sat there and talked a few minutes, and him and this other gentleman got up and walked out, and he said he would see me later, and I said all right. I seen he was busy at the time.

Q. When did you learn that Clayton was living out there at the house, on this trip—You say the first night there was no one there?

A. That is right.

Q. And you say later you drove Bunny out there? A. Yes, sir.

Q. Did Bunny indicate any fear about meeting Clayton in regard to his testifying and giving statements in this case?

A. If he did he didn't say nothing about it. He did not show any fear about facing Clayton?

[445]

A. I don't know whether he did or not. I don't know what he had in his mind.

Q. Are you still living at the Pacific Hotel?

A. No, sir.

Q. Where are you living now?

A. I am living out at the house with my sister, Shirley.

Q. How long have you been living there?

A. Since the 29th.

Q. Of November? A. Yes.

Q. And your sister and Clayton have been there

(Testimony of Robert Doores.)

constantly and you were there constantly from that time to the present time?

A. I have been there quite steady.

Q. And you have discussed this case?

A. There has been very little said about the case out there.

Q. When did you go and tell the attorneys in this case these things that Bunny said?

A. I went to Clayton first and told him what Bunny had told me, and I said, "George, them guys is framing you and lying about you" and he said, "Well, I would rather not discuss the case with you. I would rather you would go and see my lawyer, Mr. Smith."

Q. When was that?

A. I don't remember just what date that was. Mr. Smith has [446] it down. I don't know whether it was the next day. I believe it was the next day after I took Bunny out to the house.

Q. The next day after you took Bunny out to the house?

A. I believe it was. I wouldn't say it for sure.

Q. You went to see Mr. Smith?

A. No. It wasn't then I went. I went to see Mr. Smith, but I am not sure. I went out and told Clayton that they was framing him, and he said, "You will have to see my lawyer. I would rather not discuss the case with you" and I said, "Okeh." And I don't remember what time it was that I went to see Mr. Smith.

(Testimony of Robert Doores.)

Q. Was it before or after Thanksgiving you had this talk?

A. It was before Thanksgiving. If I remember right, Your Honor, it was the day I took Bunny out to Clayton's house, when I brought him back to town, and then he said things about Clayton, coming back in the car, that convinced me then he was really framing Clayton, and—— [449]

Q. That was on the 22nd?

A. Yes, sir. I know when I brought my brother back to town we went to the Pacific Hotel and when we went in the lobby the clerk said, "We have a vacancy," and I said, "That is fine." And I took the room and that was the 21st I registered.

Q. And you went out to see Mr. Clayton the next day after that?

A. I think it was the next morning.

Q. And it was on the 29th, or a week later, about the 29th, you went to see Mr. Smith and he was trying a case in Coeur d'Alene?

A. I believe it was. I believe it was two days we waited for Mr. Smith on the case in Coeur d'Alene.

Q. And did you see him on Saturday the 2nd, the Saturday before the trial started?

A. I couldn't say for sure, but it was a few days before the trial started. I wanted to go on home and go back to work, and they advised me to stay.

Q. When did you move out to the Clayton house? A. On the 29th.

(Testimony of Robert Doores.)

Q. The same day you tried to see Mr. Smith the first time? A. I believe it was.

Q. Going back to the 17th, tell us when you saw Shirley the first time after that. Did you see her while you and [450] Bunny were living together?

A. Thanksgiving Day I think she came back Thanksgiving morning, if I remember right.

Q. And you saw her then?

A. I believe it was. I wouldn't say for sure but I believe it was Thanksgiving Day, because I ate Thanksgiving dinner with her.

Q. So she got there the day before?

A. Yes, sir.

The Court: Any further questions?

Mr. Smith: That is all.

#### Recross Examination

By Mr. Connelly:

Q. Did you tell Bunny you were satisfied in your own mind he was framing Clayton?

Mr. Smith: I object to that.

Mr. Connelly: He said he discovered it at some later date.

The Court: The objection is overruled.

Q. (Mr. Connelly): The Court says that you may answer the question.

A. I didn't tell him in exactly those words. I told him I didn't think it was right for him to frame a man like that. [451]

Q. At whose suggestion was it that you and Bunny drove out to the Clayton house?

A. Bunny's.

(Testimony of Robert Doores.)

Q. Was that after you had become convinced in your own mind that Bunny was framing Clayton?

A. Yes, sir. I had a good hunch he was framing him.

Q. You said he told you he was framing him on the 17th. What more did you need to convince you, in your own mind?

A. I know Bunny pretty well, and I know he gets a little careless with the truth sometimes.

Q. You did not believe him?

A. I didn't know what to believe, because he will tell you one lie and turn around and tell you forty more to square the first one, and I know him as my brother. He asked if I would drive him to Clayton's house and I said I would, and I didn't know what it was for.

Q. Has Clayton given you any money for remaining here and testifying?

A. No, sir; not a dime.

Q. He has just fed you and housed you since the 29th?

A. I have been out there visiting with my sister.

Q. You don't know when you were subpoenaed in this case?

A. I think the 5th, if I remember right.

Q. The 5th of December? A. Yes, sir.

[452]

Q. You were hanging around here with a job at Coos Bay without knowing what you were hanging around for?

(Testimony of Robert Doores.)

A. I wanted to see a little justice. It is bad enough for a man to go to the penitentiary when he is guilty, let alone when he is innocent.

Mr. Connelly: That is all.

Mr. Smith: That is all.

(Witness excused.)

Mr. Smith: The defendant rests.

The Court: Any rebuttal?

Mr. Connelly: No, Your Honor.

The Court: How long do you want to argue?

Mr. Smith: Does Your Honor want to limit the argument?

The Court: Yes, I always limit the arguments.

Mr. Smith: We should like at least an hour and a quarter or an hour and a half on a side. I would say. Mr. Gleeson and I both have some remarks we want to make about the case.

The Court: The jury may retire for a minute.

(The jury then retired to the jury room.)

Mr. Smith: All the testimony on the part of the Government and defendant having been fully completed, [453] and both the Government and the defendant having rested their case, the defendant at this time reviews his challenge to the sufficiency of the evidence; moves that the action be dismissed, or in the alternative that the Court instruct the jury to return a verdict of not guilty, as to the charge contained in the indictment.

The Court: The motion is denied and an exception allowed.

(Testimony of Robert Doores.)

(The jury then took its place in the jury box and Mr. Connelly presented his opening argument to the jury, in the course of which he said, in part, as follows:)

Mr. Connelly: . . . . It is going to be argued by the defense that this old mother loaned her son \$2,000. . . . . It is not a story which can be considered reasonable by any test of reason, in weighing the testimony, because she does not even offer you an explanation as to where the money came from, in what form it was, whether or not it was ever in a bank, or whether or not her son was son enough to give her a note to evidence the indebtedness, and you are sitting here as triers of the facts in an important lawsuit. I can only say to you do not be led astray by sentimental considerations. You are dealing with people of the under-world. Don't forget that for a moment. If a jury's intelligence can be stultified and insulted by a defense of that character, I say the bars [454] are down——

Mr. Smith: Just a moment. We will have to raise an objection to an argument of that kind. I think it is highly prejudicial.

The Court: I will sustain the objection, and instruct the jury to disregard the last statement.

Mr. Connelly: . . . . Kelly was man enough to plead guilty and testify, and there was nothing I could offer him. The penalties in this court are fixed by the Court alone. District Attorneys are not even allowed to make recommendations as to penalties.

(Testimony of Robert Doores.)

Mr. Smith: This argument is outside the case, and I object to it.

The Court: I think it is perfectly proper argument, and I will not sustain the objection. Under the instructions you have requested, I think it is proper.

(At the conclusion of Mr. Connelly's argument, Mr. Gleeson and Mr. Smith presented their respective arguments to the jury on behalf of the defendant, which argument was not reported by the Court Reporter.)

(Mr. Connelly then presented to the jury the closing argument on behalf of the Plaintiff, during which argument he said, in part, as follows, to-wit:)

Mr. Connelly: . . . . . What can Kelly hope to get out of [455] it? Nothing. He has pled guilty here.

Shirley Doores has pled guilty, and in that connection, talking about witnesses who did not appear and those who did, has it occurred to you that the matter of the deed, paying the money, the exchange of deeds, the absence of Clayton from the meeting when the conspiracy was planned, if this were only Shirley Doores' deal with Kelly and Bunny, and if that is what he is relying on under this indictment for conspiracy, if the contentions of this man Clayton and the arguments of his counsel are true, the answer to all of it would be a simple statement of fact upon the witness stand from this girl who had pled guilty already.

(Testimony of Robert Doores.)

Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

The Court: The jury is the exclusive judge of all [456] the testimony, and will pass upon the argument, and give it such weight as it sees fit.

Mr. Connelly: . . . . We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that \$1250. You have heard Clayton's explanation of that, that he gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

I submit the verdict should be guilty.

Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case.

The Court: The jury is the exclusive judge of

(Testimony of Robert Doores.)

all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted. [457]

(Whereupon, the Court instructed the jury,  
to-wit:)

The Court: Members of the jury, you have heard the evidence and the arguments of counsel. As you know, it is now the duty of the Court to instruct you concerning the issues in the case and the law covering those issues.

As it is my duty to give you these instructions, it is equally your duty to accept the instructions as being the law. You will consider the instructions as a whole, and not place undue emphasis upon any particular portion of them.

In this case the defendant, George Clayton, is charged by indictment, along with Shirley Doores and Edward William Kelley, with the crime of conspiracy, which I will explain more in detail to you later.

The indictment has five counts. The defendant George Clayton, who is now on trial, is charged only in Count 1, and you will give no consideration to the other counts in the indictment, and pay no attention to them. If it were permissible, I would take away from you the latter part of the indictment and only send in to the jury room with you the first count of the indictment, but the way it is drawn I cannot do that, so you will pay no attention to any other count but the first count.

The indictment is the mere charge against the

[458] defendant, and is not to be considered as evidence against him. You must indulge in no presumption against the defendant merely because of the fact that he is charged with the commission of the crime alleged in the indictment.

To the indictment the defendant has entered a plea of not guilty, which places in issue every material averment of the indictment, and casts upon the Government the burden of proving each and every averment in the indictment to your satisfaction beyond all reasonable doubt.

At a later point in the instructions I will explain to you about a conspiracy charge. I think at this point I should explain that in the charge of conspiracy under the Federal Conspiracy statute, the individuals charged with the conspiracy are charged with the act of conspiring, and then they are charged with having committed certain overt acts. In this case the indictment charges eleven overt acts.

Now, the Government has the burden of proving the conspiracy and the commission of one overt act in furtherance of it. It is not necessary for the Government to prove all of the overt acts charged. It must prove a conspiracy, plus one overt act, in furtherance of the conspiracy, so that an instruction upon the question of the [459] Government's burden to prove each and every material averment of the indictment is a little different in a conspiracy case than it is in any other case. In any other case it is necessary that the Government prove all of the allegations of the indictment. In a conspiracy trial

It is necessary to prove all of the material allegations of the body of the count, but it is necessary only to prove one of the overt acts, and prove that such overt act was committed in furtherance of the conspiracy.

The defendant is presumed to be innocent of the crime with which he is charged until guilt is established to your satisfaction and beyond all reasonable doubt. This presumption is a real thing. It is no mere fiction which either the Court or the jury may ignore. It is one of the defendant's substantial and important rights. It attaches to him and continues throughout all steps of the trial and throughout all steps of your deliberations as jurors. Until you have become satisfied of the defendant's guilt beyond all reasonable doubt, notwithstanding the presumption of innocence with which the law surrounds him, you must give him the benefit of his presumption, and give to the presumption its full weight and importance.

A reasonable doubt means such a doubt as will cause a reasonable, prudent and considerate man to hesitate or [460] waver in the graver and more important concerns of life. In a trial a reasonable doubt is such as a doubt as will cause you as jurors, being reasonable, prudent and considerate, to hesitate or waver before acting upon the truth of the matters charged or alleged. Such a doubt may arise from the evidence in the case or from the lack of evidence. You will not be swayed, moved, or become frightened by doubts which are purely fanciful or imaginary. On the other hand, you will not convict

in the face of doubts which are real and substantial. If after all fair, candid, common sense consideration of all the evidence in the case you can say upon your oaths as jurors that you have an abiding conviction of the truth of the charge to a moral certainty, then you have no reasonable doubt and should convict. If you have no such conviction to a moral certainty, if you entertain doubt for which sane and satisfactory reasons can be given in your mind, you must give the defendant the benefit of such doubt and find him not guilty.

You are exclusive judges of what is the evidence in this case, and of the weight and credit to be given the testimony of each witness. In doing this you may take into consideration the conduct, appearance and demeanor of the witness while testifying, his apparent candor and frankness, or the lack of such qualities, if [461] any such lack appeared; the reasonableness or the unreasonableness of his story, its probability or its improbability as measured by your common experience in life; the opportunity or lack of opportunity on the part of any witness of knowing or being informed concerning the matters about which he testified; his intelligence or lack of intelligence; any prejudice or bias disclosed by him; any motive which in your judgment would cause him to warp or color his testimony one way or the other, and the interest that he may have in the outcome of the case.

You will be slow to believe that any witness has deliberately testified falsely in this case, but if you should believe any witness has deliberately testi-

fied falsely as to any material issue, then you are at liberty to disregard the entire testimony of such witness, except insofar as it may be corroborated by other evidence of credible character.

In this case two of the witnesses, Mr. Kelly and Mr. Wesley Doores, are what are known in law as accomplices. The fact that witness is an accomplice doubtless operates and ought to operate largely against the credibility of his testimony, but the jury is not bound to reject such testimony merely because the witness is an accomplice. While it would be unsafe to convict anyone upon the uncorroborated testimony of [462] accomplices in the crime, the rule of law is well settled that accomplices are competent witnesses, and it is your duty to consider their testimony. In doing this you should weigh it and scrutinize it with great care. You are to test the truth of the testimony submitted by an accomplice by inquiring into the probably motives which prompted it and to what extent such motives might have colored or warped it. You are to look into the testimony of other witnesses in the case for corroborating facts or circumstances. Where the testimony of an accomplice is supported in material respects by credible and trustworthy evidence, you are bound to credit it, but where it is unsupported and uncorroborated you are not to rely upon it unless, after the exercise of great caution, it produced in your mind the most positive conviction of its truth, in which case you are justified in acting upon it.

In this case there has been testimony offered to

show that the Witness Wesley Doores had been heretofore convicted of a felony. The sole purpose of that testimony is to affect his credibility as a witness. When any witness is called to the witness stand it is competent to show that such witness has been convicted of a felony, and the jury in viewing the testimony should take that fact into consideration in connection with all the other [463] facts and circumstances surrounding the witnesses as disclosed from the witness stand, and then in the light of all of the facts, value the testimony of each witness at what you conscientiously consider it to be worth.

As I have pointed out, this defendant is charged with conspiracy, and only with the crime of conspiracy. The first count of the indictment involves the charge of conspiracy, the violating of a statute of the United States. The charge is that this defendant, Shirley Doores and Edward William Kelley, and others whose names to the Grand Jury are unknown, conspired to violate a statute of the United States by having extorted money from Dr. E. H. Teed, through the medium of Edward William Kelly impersonating a Federal narcotics agent.

A conspiracy to commit an offense against the United States means an unlawful agreement to do some act which by some law of the United States has been made a crime. The statute of the United States makes it a crime to impersonate a Federal officer of the United States.

When parties conspire to do acts and things which necessarily and inevitably must constitute

a violation of the criminal laws of the United States, then such parties conspire to commit an offense against the United States, and a party conspires to commit an offense against the United States when he conspires to bring about the [464] commission of such an offense by another.

The agreement or combination is the gist of the offense indictable and punishable under the statute. overt acts charged in the indictment to affect the object of the conspiracy, is necessary to make the offence indictable and punishable under the statute. By the expression "an act to effect the object of the conspiracy," commonly called "an overt act," is meant an act done by one or more of the conspirators, after the formation of the corrupt agreement or combination and during its existence, for the purpose of carrying such agreement or combination into effect.

The indictment in this case charged that the conspiracy alleged existed between April 9, 1944, and May 25, 1944. In order for any overt act to be binding upon any defendant than the one performing it, it must have been done between these two dates. The same is true of statements made by any of the defendants. No act done or statement made by any defendant after May 25, 1944, is binding upon any other than the defendant doing or making it.

Concerted action to violate the law is ordinarily shown by separate independent acts, each tending to exhibit and establish a common design and purpose on the part of those doing or participating

in such acts. This [465] common design and purpose is the essence of the crime of conspiracy, but to establish it it is not necessary to prove that the parties came together formally and actually agreed to terms to have that design or purpose or to pursue it by concert of action or by common means. The jury will be justified in inferring the existence of a conspiracy, if the Government satisfies you beyond a reasonable doubt, by the testimony of credible witnesses, that any two or more of the persons named in the indictment aimed by their acts to accomplish the same unlawful purpose or object, although all the parties so participating may never have met together at the same time to concert the means or to give effect to the unlawful design and purpose. Everyone coming into a conspiracy at any stage of the proceedings, with knowledge of its existence, is regarded in law as a party to the conspiracy, and as a party to all the acts done by any of the other parties to the conspiracy, either before or afterwards, during the period charged in the indictment in pursuance of the common design and purpose. One charged with conspiracy with many others may be convicted on proof of his conspiring with any of such others, without proof of a conspiracy participated in by all of them. The mere knowledge, acquiescence or approval of the act, without cooperation or agreement to cooperate, is not enough to [466] constitute one a party to a conspiracy. There must be intentional participation in the transaction, with

a view to the furtherance of the common design and purpose.

If you find from the evidence beyond all reasonable doubt that a conspiracy existed as charged in the indictment, then the acts and declarations of each party to such conspiracy, done or made in furtherance of the common design during the period alleged in the indictment and for the purpose of carrying the criminal enterprise into effect, are in contemplation of law the acts and declarations of all the parties to the conspiracy and are binding on all such parties.

But for the purpose of establishing the existence of a conspiracy or the connection of any defendant with it, the statements and declarations of each defendant must be confined to the defendant making them and no other defendant is bound by such statements or declarations.

A conspiracy may be proved either by direct or circumstantial evidence. It is not unusual for it to be proved by the use of circumstances. So the law says that in a conspiracy case the Government may be permitted to present its case on what the law calls circumstantial evidence. When it does ask for a conviction on circumstantial evidence, however, it has the burden not only of proving each of the essential facts or circumstances [467] to your satisfaction beyond all reasonable doubt, but it must also satisfy you beyond all reasonable doubt that such circumstances are only consistent with guilt.

You must believe before you can find the defendant guilty in this case upon the basis of circumstan-

tial evidence, that the circumstances proved as to him exclude all possibility of innocence, and that, after considering all the inferences reasonably to be drawn from the circumstances, your sound judgment requires you to reject any other inference and accept only the inference of guilt. This rule applies not only to the conspiracy, but as to the participation of any defendant in it. The law requires that you study all the evidence and that you weigh carefully the conclusions or inferences to be drawn from it. This includes conclusions or inferences favorable to each defendant as well as those unfavorable. It is only when a jury can say that, taking all the evidence and all reasonable inferences to be drawn from it, the circumstances exclude every reasonable conclusion except that of guilt, that a jury is justified in finding a defendant guilty on circumstantial evidence.

When you shall have retired to the jury room you will select one of your number to act as foreman, who will represent you in the further conduct of the case in court. You will take with you the indictment in the case [468] and the exhibits which have been admitted in evidence. You will also take with you a blank form of verdict. You know by now from previous experience the form I regularly use, and it is used only for the purpose of convenience, and is in no way taken as indicating any idea which I have about the case. It is very simple: "We the jury in the above-entitled cause do find the defendant Blank guilty as charged in the indictment." If you find the defendant guilty, the blank before

the word "guilty" will remain blank. If you find him not guilty, the word "not" will be inserted before the word "guilty." It will require the concurrence of the entire jury to agree upon a verdict, and when the verdict has been agreed upon you will have it signed by your foreman and will return with it into court in the presence of the defendant and in the presence of the entire jury,

Any discussion of the instructions?

Mr. Connelley: Yes. Shall I state it in open court or at the bench?

The Court: Come up here.

(The following proceedings were then had at the Court's bench, without the hearing of the jury:)

Mr. Connelly: I listened very carefully, as carefully as I was able to, and it is not clear to me that in the Court's definition of an overt act necessary to [469] constitute the crime, whether it might be the overt act of any of the defendants other than the defendant charged against in this case.

Mr. Smith: I think Your Honor has fully instructed on that point. The only exception I might take is to that very thing. They are very fine instructions.

The Court: They do not have to prove the overt act was by this defendant.

Mr. Smith: You have fully instructed on that.

Mr. Connelly: I feel that the last instruction on circumstantial evidence excludes all the direct testimony of the conspiracy, because each time you

say "you will find the defendant not guilty," if the case is based upon circumstantial evidence, which in this case it is not. It is a combination of direct evidence and circumstantial evidence.

Mr. Smith: We feel that the instructions as given fully cover the case, and that to give any more at this time will simply emphasize certain matters and it will be to the prejudice of this defendant, and we object to the giving of any further instructions.

The Court: The exception will be allowed.

Mr. Smith: I have no exceptions to the instructions as given. [470]

(Whereupon, the following proceedings were then had in the presence and hearing of the jury, to-wit:)

The Court: I do not want to over-emphasize any instruction that I have given. The instruction on conspiracy is rather complicated and difficult, as you realize, and in carrying out a certain suggestion made by Mr. Connelly, I am in no way emphasizing any particular point.

I will again call your attention to the fact that in the proof of overt acts the burden the Government has is to prove the body of the conspiracy, beyond all reasonable doubt, as to the conspiracy showing the agreement, which is the gist of the action, and to also show one of the overt acts alleged was committed in furtherance of the conspiracy.

That does not mean any particular one or more than one. They must prove one or more of the

overt acts alleged was committed by one of the defendants in furtherance of the conspiracy.

Mr. Connelly also has the feeling that by instructing you upon circumstantial evidence that you might have the idea I was limiting your consideration of the case to circumstantial evidence.

The Government in this case is attempting to make its case both on the claim of direct evidence and cir- [471] cumstantial evidence. I have instructed you about your consideration and the tests you will use in testing the testimony of Wesley Doores and Edward Kelly, and also the general tests that you will use in passing upon the testimony of witnesses without any specific classification, the Government contending that under the testimony of Wesley Doores and Edward Kelly it has direct evidence of the defendant having participated, but it is also relying upon circumstantial evidence, and you will consider the instructions as to each, and in considering the question of circumstantial evidence you will follow the instruction I have given you and weigh such testimony according to the standards I have laid down for you in testing circumstantial evidence.

Any further questions?

Mr. Connelly: No, Your Honor.

The Court: Swear the bailiffs.

(The bailiffs were then duly sworn.)

The Court: You will now retire to consider your verdict.

(The jury then retired to consider its verdict.) [472]

[Title of District Court and Cause.]

**CERTIFICATE OF TRIAL JUDGE**

The above and foregoing cause was tried before the undersigned Lewis B. Schwellenbach, Judge of the United States District Court for the Eastern District of Washington; within thirty (30) days after the date of the judgment, the time for filing, settling and procuring to be settled and signed the Bill of Exceptions in said cause was by me extended to April 16, 1945.

Now, Therefore, I, the Trial Judge aforesaid, do hereby sign, settle and certify the above and foregoing proposed Bill of Exceptions filed herein as the Bill of Exceptions in said cause.

Dated this 16th day of April, 1945.

**L. B. SCHWELLENBACH**  
District Judge

Approved: and Notice Waived.

**EDWARD M. CONNELLY**  
Attorney for Plaintiff and United States District  
Attorney.

**HAROLD M. GLEESON**  
Atty. for Defendant.

Service Accepted & Copy Received March 23rd,  
1945.

**EDWARD M. CONNELLY**  
Attorney for Plaintiff  
By JEAN GIEBEL  
Chief Clerk. [473]

[Title of District Court and Cause.]

### ASSIGNMENTS OF ERROR BY DEFENDANT GEORGE CLAYTON

Comes now the defendant and appellant, George Clayton, by his attorneys and states that in the proceedings herein and in the order and judgment entered herein there are manifest errors, and he assigns the following errors committed by the above entitled Court in the proceedings in the above entitled cause, to-wit:

#### Assignment of Error No. 1

The District Court erred in overruling appellant's motion, made at the end of the Government's case, to dismiss the indictment on account of the insufficiency of evidence, the contradictory nature thereof, and the lack of creditable proof of the existence of a conspiracy.

#### Assignment of Error No. 2

The District Court erred in failing to grant appellant's motion, made at the conclusion to all of the testimony, for a directed verdict of acquittal, or a dismissal of the indictment on the grounds of the insufficiency of the evidence, the contradictory nature of the testimony of the Government, and that all the circumstances relied upon by the Government were susceptible of two constructions, and the District Court was required as a matter of law to find that such circumstances indicated innocence rather than guilt on the part of the appellant.

## Assignment of Error No. 3

That the Court ered in permitting the U. S. District Attorney over the objection and exception of the defendant to argue as follows:

“Mr. Connelly, (District Attorney): It is going to be argued by the defense that this old mother loaned her son \$2,000 \* \* \* \* \* It is not a story which can be considered reasonable by any test of reason, in weighing the testimony, because she does not even offer you an explanation as to where the money came from, in what form it was, whether or not it was ever in a bank, or whether or not her son was son enough to give her a note to evidence the indebtedness, and you are sitting here as triers of the facts in an important law suit. I can only say to you do not be led astray by sentimental considerations. You are dealing with people of the under-world. Don’t forget that for a moment. If a jury’s intelligence can be stultified and insulted by a defense of that character, I say the bars are down———”

“Mr. Smith: Just a moment. We will have to raise an objection to an argument of that kind. I think it is highly prejudicial.

“The Court: I will sustain the objection, and instruct the jury to disregard the last statement.

\* \* \* \* \*

“Mr. Connelly: \* \* \* \* \* Kelly was man enough to plead guilty and testify, and there was nothing I could offer him. The penalties in this court are fixed by the Court alone. District Attorneys are not even allowed to make recommendations as to penalties.

"Mr. Smith: This argument is outside the case, and I object to it.

"The Court: I think it is perfectly proper argument, and I will not sustain the objection. Under the instructions you have requested, I think it is proper.

"Mr. Connelly: \* \* \* \* \* Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her makeup, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

"Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

"The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

"Mr. Connelly: \* \* \* \* \* We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that \$1250. You have heard Clayton's explanation of that, that he

gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

"I submit the verdict should be guilty."

"Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case."

"The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted."

#### Assingment of Error No. 4

That the Court ered in permitting the U. S. District Attorney over the objection and exception of the defendant to argue as follows:

"Mr. Connelly: \* \* \* \* \* What can Kelly hope to get out of it? Nothing. He has pled guilty here.

"Shirley Doores has pled guilty, and in that connection, talking about witnesses who did not appear and those who did, has it occurred to you that the matter of the deed, paying the money, the exchange of deeds, the absence of Clayton from the meeting when the conspiracy was planned, if this were only Shirley Doores' deal with Kelly and Bunny, and if that is what he is clinging to on this indictment for conspiracy, if the contentions of this man Clayton and the arguments of his counsel are true, the answer to all of it would be a simple statement of fact upon the witness stand from this girl who has pled guilty already.

"Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told

you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

“Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

“The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

“Mr. Connelly: \* \* \* \* \* We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that \$1250. You have heard Clayton's explanation of that, that he gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

“I submit the verdict should be guilty.

“Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case.

“The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted.”

**Assignment of Error No. 5**

The District Court erred in permitting the United States District Attorney to comment in his argument to the jury, over the objection and exception of the defendant, that the defendant, George Clayton, failed to call as a witness in his behalf an alleged co-conspirator, Wilma Shirley Doores, a defendant in the same action but not on trial, which argument was as follows:

"Mr. Connelly: \* \* \* What can Kelly hope to get out of it? Nothing. He has plead guilty here.

Shirley Doores has pled guilty, and in that connection, talking about witnesses who did not appear and those who did, has it occurred to you that the matter of the deed, paying the money, the exchange of deeds, the absence of Clayton from the meeting when the conspiracy was planned, if this were only Shirley Doores' deal with Kelly and Buny, and if that is what he is clining to on this indictment for conspiracy, if the contentions of this man Clayton and the argument of his counsel are true, the answer to all of it would be a simple statement of fact upon the witness stand from this girl who has pled guilty already.

Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not

taken this witness stand and supported her common-law husband in one single iota of his claim here.

Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

Mr. Connelly: \* \* \* We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that \$1250. You have heard Clayton's explanation of that, that he gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

I submit the verdict should be guilty.

Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted."

#### Assignment of Error No. 6

The District Court erred in further instructing the jury upon the subjects of conspiracy and circumstantial evidence at the request of plaintiff's attorney and over the objection of defendant after

the jury had been fully and completely instructed upon said subjects, thereby serving to emphasize in the jury's mind said instructions and, further, to weaken the instructions as given by the Court, to the prejudice of the defendant, which was as follows:

"Any discussion of the instructions?

Mr. Connelly: Yes. Shall I state it in open court or at the bench?

The Court: Come up here.

(The following proceedings were then had at the Court's bench, without the hearing of the jury:)

Mr. Connelly: I listened very carefully, as carefully as I was able to, and it is not clear to me that in the Court's definition of an overt act necessary to constitute the crime, whether it might be the overt act of any of the defendants other than the defendant charged against in this case.

Mr. Smith: I think Your Honor has fully instructed on that point. The only exception I might take is to that very thing. They are very fine instructions.

The Court: They do not have to prove the overt act was by this defendant.

Mr. Smith: You have fully instructed on that.

Mr. Connelly: I feel that the last instruction on circumstantial evidence excludes all the direct testimony of the conspiracy, because each time you say "you will find the defendant not guilty," if the case is based upon circumstantial evidence, which

in this case it is not. It is a combination of direct evidence and circumstantial evidence.

Mr. Smith: We feel that the instructions as given fully cover the case, and that to give any more at this time will simply emphasize certain matters and it will be to the prejudice of this defendant, and we object to the giving of any further instructions.

The Court: The exception will be allowed.

Mr. Smith: I have no exceptions to the instructions as given.

(Whereupon, the following proceedings were then had in the presence and hearing of the jury, to-wit:)

The Court: I do not want to over-emphasize any instruction that I have given. The instruction on conspiracy is rather complicated and difficult, as you realize, and in carrying out a certain suggestion made by Mr. Connelly, I am in no way emphasizing any particular point.

I will again call your attention to the fact that in the proof of overt acts the burden the Government has is to prove the body of the conspiracy, beyond all reasonable doubt, as to the conspiracy showing the agreement, which is the gist of the action, and to also show one of the overt acts alleged was committed in furtherance of the conspiracy.

That does not mean any particular one or more than one. They must prove one or more of the overt acts alleged was committed by one of the defendants in furtherance of the conspiracy.

Mr. Connelly also has the feeling that by instructing you upon circumstantial evidence that you might have the idea I was limiting your consideration of the case to circumstantial evidence.

The Government in this case is attempting to make its case both on the claim of direct evidence and circumstantial evidence. I have instructed you about your consideration and the tests you will use in testing the testimony of Wesley Doores and Edward Kelly, and also the general tests that you will use in passing upon the testimony of witnesses without any specific classification, the Government contending that under the testimony of Wesley Doores and Edward Kelly it has direct evidence of the defendant having participated, but it is also relying upon circumstantial evidence, and you will consider the instructions as to each, and in considering the question of circumstantial evidence you will follow the instruction I have given you and weigh such testimony according to the standards I have laid down for you in testing circumstantial evidence."

And by reason of said errors and other manifest errors appearing in the record herein, the defendant and appellant, George Clayton, respectfully prays that the judgment of conviction herein be set aside and that the indictment be fully and in all respects dismissed as to him and that he be fully discharged herein or in the alternative that he be granted a new trial.

Dated this 16th day of April, 1945.

ROBERTSON & SMITH  
By DEL CORY SMITH, JR.

ROBERT M. GLEESON  
Attorneys for Defendant,  
George Clayton

Service of the foregoing Assignments of Error by Defendant George Clayton is hereby accepted, and the receipt of a copy thereof is hereby acknowledged, this 16th day of April, 1945.

EDWARD M. CONNELLY  
United States Attorney, Counsel for Plaintiff-  
Appellee United States of America.

[Endorsed]: Filed Apr. 16, 1945.

---

[Endorsed]: No. 10972. United States Circuit Court of Appeals for the Ninth Circuit. George Clayton, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed April 25, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10972

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
againstGEORGE CLAYTON,  
Defendant-Appellant.STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY, AND  
DESIGNATION OF PARTS OF RECORD  
TO BE PRINTED

Appellant George Clayton for his statement of points upon which he intends to rely on his appeal to this Court from the judgment and conviction entered by the District Court of the United States for the Eastern District of Washington, Northern Division, on April 16, 1945, hereby adopts the specifications of errors contained in his Assignments of Error filed by him on April 16, 1945.

DESIGNATION OF PARTS OF RECORD  
TO BE PRINTED

Pursuant to Rule 19(6) of the Rules of this Court, appellant George Clayton states that the entire record on appeal is necessary for the consideration of the appeal from the judgment and conviction herein and that accordingly said appellee

lant designates for printing the entire record, including the exhibits.

Dated this 23rd day of April, 1945.

ROBERTSON & SMITH

By DEL CORY SMITH, JR.

HAROLD M. GLEESON

Attorneys for Defendant-

Appellant George Clayton

Service of the foregoing Statement of Points on which Appellant Intends to Rely and Designation of Parts of Record to be Printed is hereby accepted, and the receipt of a copy thereof is hereby acknowledged, this 23rd day of April, 1945.

EDWARD M. CONNELLY

United States Attorney, Counsel for Plaintiff-  
Appellee United States of America.

By JEAN GIEBEL

[Endorsed]: Filed Apr. 25, 1945. Paul P.  
O'Brien, Clerk.



NO. 10972

IN THE

United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

GEORGE CLAYTON, *Appellant,*

*vs.*

UNITED STATES OF AMERICA, *Appellee.*

---

On Appeal From the District Court of the United  
States for the Eastern District of Washington

---

BRIEF FOR THE UNITED STATES

---

EDWARD M. CONNELLY,  
*United States Attorney.*

HARVEY ERICKSON,  
*Assistant United States Attorney.*

FRANK R. FREEMAN,  
*Assistant United States Attorney.*

---

Green-Hughes Ptg. Co., Spokane

FILED

AUG 17 1945

PAUL P. O'BRIEN,



## TABLE OF CONTENTS

Statement of the Case .....	1
Argument and Answer to Appellant's Specifica- tion of Errors 1 and 2 .....	9
Argument and Answer to Appellant's Specifica- tion of Errors 3 and 4 .....	17
Argument and Answer to Appellant's Specifica- tion of Error 5 .....	20
Argument and Answer to Appellant's Specifica- tion of Error 6 .....	32

## TABLE OF CASES AND TEXTS CITED

	Page
<i>Alford v. United States</i> , 282 U. S. 687, 693 .....	29
<i>Benson v. United States</i> , 146 U. S. 325 .....	26, 27
<i>Berger v. United States</i> , 295 U. S. 78, 89 .....	17
<i>Brickey, v. United States</i> , 123 F. (2d) 341 .....	15
<i>Clifton v. United States</i> , 4 How. 242, 247 .....	22
<i>Duncan v. State</i> , 2 Pac. (2d) 285 .....	29
<i>Egan v. United States</i> , 52 App. D. C. 384, 287 F. 958, 969 .....	31
<i>Funk v. United States</i> , 290 U. S. 371, 377, 380....	26
<i>Gorman v. State</i> , 92 Pac. (2d) 1086, 1096 ....	28, 29
<i>Graves v. United States</i> , 150 U. S. 118 .....	20
<i>Grunberg v. United States</i> , 145 F. 81, 88 .....	31
<i>Hancock v. State</i> , 241 Pac. 1108 .....	29
<i>Hopkins v. State</i> , 146 Pac. 917 .....	28
<i>Interstate Circuit v. United States</i> , 306 U. S. 208, 225, 226 .....	22, 23
<i>Kirby v. Talmadge</i> , 160 U. S. 379, 383, 16 S. Ct. 349, 350, 40 L. Ed. 463 .....	22

	Page
<i>Lincoln National Life Insurance Co. v Erickson,</i> 8 Cir., 42 F. (2d) 997 .....	22
<i>Lowry v. United States</i> , 128 F. (2d) 477, 479, 480 .....	21
<i>Mammoth Oil Co. v. United States</i> , 275 U. S. 13, 48 S. Ct. 1, 72 L. Ed. 137 .....	22
<i>Milton v. United States</i> , 110 F. (2d) 556, 559 .....	21
<i>Moyer v. United States</i> , 78 F. (2d) 624 .....	29, 30, 31
<i>Northern Railway Co. v. Page</i> , 274 U. S. 65, 74, 47 S. Ct. 491 71 L. Ed. 929 .....	23
<i>Rosen v. United States</i> , 245 U. S. 467 .....	26, 27
<i>Runkle v. Burnham</i> , 153 U. S. 216, 225 .....	22
<i>Sacramento Suburban Fruit Lands Co. v     Boucher</i> , 36 F. (2d) 912 .....	31
<i>Stewart v. Southern Ry. Co.</i> , 315 U. S. 283, 289 .....	23
<i>Tatum v. United States</i> , 146 F. (2d) 406 .....	18
<i>United States v. Aluminum Company of America</i> , 44 F. Supp. 97, 275 .....	22
<i>United States v. Cotter</i> , 60 F. (2d) 689 (287 U. S. 666, c. d.), 691, 692 .....	20, 21, 23
<i>United States v. Reid</i> , 12 How. 361 (1851) .....	26
<i>Vicreck v. United States</i> , 318 U. S. 236, 247 .....	17
<i>West v. United States</i> , 113 F. (2d) 68 .....	15
16 <i>Corpus Juris</i> 541 .....	31
<i>Wigmore on Evidence</i> , Volume II, par. 285, 287, 288, 290 .....	24, 27

#### TABLE OF STATUTES AND REGULATIONS CITED

<i>Criminal Code</i>	
Section 76 (18 U. S. C. A.) .....	1
Section 88 (18 U. S. C. A.) .....	1

NO. 10972

IN THE

United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

GEORGE CLAYTON, *Appellant*,

*vs.*

UNITED STATES OF AMERICA, *Appellee*.

---

On Appeal From the District Court of the United  
States for the Eastern District of Washington

---

BRIEF FOR THE UNITED STATES

---

STATEMENT OF THE CASE

The appellant, George Clayton, was charged jointly with the defendants, Wilma Shirley Doores and Edward Kelly, with conspiracy to extort money and narcotic drugs from one, Dr. E. H. Teed, a practicing physician of Coeur d'Alene, Idaho, through the imprisonment of a Federal narcotic officer in violation of Sections 76 and 88, Title 18, U.S.C.A. as set forth in Count I of the indictment, the charging part of which is as follows:

"That WILMA SHIRLEY DOORES, EDWARD WILLIAM KELLY, and GEORGE CLAYTON, in Spokane County and within the

jurisdiction of the Northern Division of the United States District Court for the Eastern District of Washington, commencing some time shortly prior to April 9, 1944, the exact date being to the Grand Jurors unknown, and continuing thereafter to on or about May 25, 1944, did willfully, unlawfully and feloniously conspire, combine, confederate and agree together, and each with the other and each with diverse other persons to the Grand Jurors unknown, to commit crimes and offenses against the United States as follows, to-wit: To violate Title 18, Section 76, U.S.C.A. in the following manner and by the following means:

"That the said defendants did conspire, combine and agree that the defendant EDWARD WILLIAM KELLY, with intent on the part of each of said defendants to defraud one Dr. E. H. Teed of Coeur d'Alene, Idaho, a practicing physician of that city, of money and narcotic drugs, would falsely assume and pretend to be an officer acting under the authority of the United States, to-wit, an inspector and officer of the Narcotics Division of the United States of America, and that the said defendant EDWARD WILLIAM KELLY would take upon himself to falsely act as such inspector and officer of the Narcotics Division of the Treasury Department of the United States of America, and in such pretended character as such officer would threaten to arrest the said Dr. E. H. Teed for unlawfully disposing of narcotic drugs, which the defendant, WILMA SHIRLEY DOORES, would induce the said Dr. E. H. Teed to unlawfully sell and dispose of to her, the said money and narcotic drugs so to be fraudulently obtained from the said Dr. E. H. Teed were intended by said defendants to be secured from the said D. E. H. Teed by the said defendant WILMA SHIRLEY DOORES in consideration

of the said EDWARD WILLIAM KELLY while acting in his pretended capacity as a narcotics agent of the Treasury Department of the United States, failing to arrest, apprehend or institute prosecution against the said Dr. E. H. Teed for unlawfully selling and disposing of narcotics to the said defendant WILMA SHIRLEY DOORES."

The indictment contained four other counts, none of which involved the appellant, George Clayton. Defendants Wilma Shirley Doores and Edward Kelly, entered pleas of guilty to the conspiracy count and to the other substantive counts not involved in this appeal. Neither defendants Doores nor Kelly had been sentenced at the time of the trial. The trial resulted in the verdict of guilty on the conspiracy count as to George Clayton.

The evidence produced at the trial established that on April 9, 1944, Clayton, Kelly, Wilma Shirley Doores, and Wesley Doores, a brother of Shirley met at the home of George Clayton and Shirley Doores at E. 7225 Carlisle Avenue in the City of Spokane. This residence was jointly occupied by George Clayton and Shirley Doores. The evidence indicated that George Clayton and Shirley Doores had lived together approximately five years under a so-called common law husband and wife relationship, and were residing at the above residence in that relationship at the time of the meeting.

On April 9, 1944, at said residence, the four individuals mentioned above discussed the plans and

the means for the extortion of money and narcotic drugs from Dr. E. H. Teed, a practicing physician at Coeur d'Alene, Idaho. It was there agreed that Edward Kelly would impersonate a W. J. Graben, a Federal narcotics agent, stationed at Seattle, Washington.

The evidence also disclosed that prior to the time of this meeting Shirley Doores had on a number of occasions secured narcotic drugs from Dr. Teed for a fictitious individual referred to as Mike Sanders, and it was the general plan that Edward Kelly, posing as a narcotics officer, would journey to Coeur d'Alene, Idaho, and advise Dr. Teed that he was checking upon the prescriptions issued to Mike Sanders. Accordingly on the morning following this meeting, to-wit, April 10, 1944, Shirley Doores and Edward Kelly went to Coeur d'Alene, where they separated. Shirley went first to the Doctor's office and after a delay of approximately 10 minutes Edward Kelly followed her there. He sat in the outer office until Shirley and the doctor came out of the doctor's private office, whereupon Kelly made known to Dr. Teed that he was W. J. Graben, a Federal Narcotics Officer, and was investigating the sale of narcotics to the above-mentioned Mike Sanders.

In carrying out his scheme of impersonation, he demanded of Dr. Teed that he be advised who Mike Sanders was and where he could be located. He further acquainted the doctor with the fact that he had already spoken to Mike Sanders and that Sanders

had advised him that at no time had he secured prescriptions for narcotics from Dr. Teed. The doctor was also advised that Kelly had a warrant for the doctor's arrest in his pocket, which he indicated he might have to serve on the doctor at a later time.

Kelly left the doctor's office thereafter and immediately returned to Spokane. Shirley Doores returned to the doctor's office later that same day, and stated to Dr. Teed that she had talked to Graben and that Graben could be fixed for \$2500. Dr. Teed paid this sum that same day to Shirley Doores.

Upon Shirley Doore's return to Spokane she met Clayton, Kelly and Wesley Doores at Moore's Card Room where Clayton had been running card games for more than a year. She announced that she had received the sum of \$300 from Dr. Teed. She gave \$100 of this sum to Kelly and \$80 to her brother, Wesley Doores. On April 11, 1944, Shirley Doores again contacted Dr. Teed and demanded \$1500 more, which she said was necessary to pay off another narcotics agent and the clerk in the narcotics office. She also demanded a quantity of narcotics. At this time Dr. Teed paid her the \$1500 and gave her 100 tablets of morphine, 50 grains of codein and 100 tablets of dilaudid, as requested.

On April 12, 1944, she again reappeared at Dr. Teed's office at Coeur d'Alene and demanded \$3500 more to pay off some of the other narcotics agents in that territory. Dr. Teed paid her this amount. She suggested to Dr. Teed at this time that he leave town

for at least several days to permit conditions to quiet down, and the doctor informed her he would go to Hailey, Idaho, and gave Shirley his address there.

On April 20, 1944, Dr. Teed received a telegram at Hailey, Idaho, from Shirley Doores requesting him to call a Spokane telephone number and ask for Shirley Doores or Shirley Clayton. He put in the call, and was told by Shirley that he should come to Spokane as quickly as possible and straighten up what appeared to be very serious complications, and that if these matters were not straightened out before Saturday, April 22, he might be arrested. Dr. Teed immediately went to Spokane and saw Shirley on the morning of April 22 at the address submitted by her to him, to-wit, 7225 East Carlisle. Shirley, after making what she told Dr. Teed was a long distance telephone call to Seattle from a sandwich stand in the neighborhood, advised Dr. Teed that an additional sum of \$6500 was required to hush a Mr. Bangs, Chief Narcotic Inspector in Seattle, together with a large amount of narcotics for Graben. Dr. Teed paid Shirley Doores \$3000 in cash that evening and the balance of \$3500 and the narcotics was given to Shirley on the Monday morning following, on April 24, 1944. Dr. Teed did not again see Kelly or Shirley until May 16, 1945.

In the meantime Shirley Doores, on Thursday, April 13, 1944, reported to Kelly that she had received an additional \$300 from Dr. Teed and paid him \$100 of that amount. Kelly suspected from in-

formation acquired on his own part and through Wesley Doores that Shirley Doores had received more than \$600 from Dr. Teed, and accordingly on or about May 15 or 16 went to Dr. Teed's office in Coeur d'Alene where he was told by Dr. Teed that \$14,000 had been paid by him to Shirley Doores. Kelly advised Dr. Teed that he had only received \$200 of the amounts paid to Shirley Doores, and said he was going back to Spokane and straighten the matter up with her. He demanded \$250 from Dr. Teed at this time, plus an additional amount of narcotic drugs. This sum, \$250, together with the drugs was paid and delivered to Kelly that day and the next morning in Spokane in front of the Milwaukee depot, along with an additional \$20 to compensate Kelly for what he termed "extra trouble".

Kelly, on his return to Spokane that afternoon, went directly to the residence jointly occupied by Shirley and George Clayton, where he accused Shirley Doores of having received \$14,000 from Dr. Teed. Clayton was called into the conversation and made the statement of, "I don't know how much money she got." (R. 123). Shirley Doores insisted that \$600 was all that she had received.

On or about the 25th day of May, Shirley Doores and Kelly again journeyed to Coeur d'Alene, Idaho, to see Dr. Teed, and the two were arrested at Dr. Teed's office on the afternoon of that same day, as a result of a call made to the Sheriff's office by Dr. Teed.

The evidence elicited at the trial showed that Clayton was the one who first suggested to Kelly that he impersonate a Federal Narcotics officer. (R. 141). Clayton first suggested to Wesley Doores that he act as a Federal Narcotics Officer and Wesley Doores refused (R. 138-139) because he was on parole. This occurred approximately three months prior to their meeting at the Clayton home where Kelly was first asked by Clayton to carry on the impersonation.

## ARGUMENT AND ANSWER TO APPELLANT'S SPECIFICATION OF ERRORS 1 AND 2

Both of these specifications of error will be answered together since they both entail a challenge to the sufficiency of the evidence upon which the verdict of guilty was based.

That the appellant, George Clayton, took an active part in the conspiracy alleged, is proven, first by the testimony of a co-conspirator, Edward William Kelly. Kelly testified at length on the stand that he had met George Clayton in Spokane in 1943 (R. 101). That on April 9, 1944, he attended a meeting at the residence of George Clayton and Shirley Doores at which meeting there was present George Clayton, Shirley Doores and Wesley Doores (R. 103). That in the course of the conversation with reference to the plans and means to extort money and narcotics from Dr. E. H. Teed of Ceeur d'Alene, Clayton stated: "I think the best way is to go up there and throw a good scare into him" (R. 104). "Clayton was present, Shirley and Bunny (Wesley Doores) and myself were present when the plans were made and we all took some part in it." (R. 105). That in answer to the suggestion that Bunny impersonate the narcotics inspector he, Clayton, said: "Bunny would be no good in that kind of a deal because he thought Dr. Teed knew Bunny."

"The Court: Who knew Bunny?

A. Dr. Teed knew Bunny.

Q. (Mr. Connelly): That is the statement you say Clayton made?

A. Yes, sir." (R. 106).

George Clayton was present throughout the entire meeting (R. 108). Clayton was present with Shirley Doores and Kelly at Moore's Card Room immediately upon her return from the first contact with Dr. Teed on April 10, 1944. (R. 117). That the three of them sat together at the lunch counter and that Shirley gave an account of her success at her meeting with the doctor at Coeur d'Alene, and that Clayton was present at the entire conversation (R. 117 and 118).

That on or about May 16, 1944, Kelly spoke to both Clayton and Shirley Doores at their joint residence in Spokane where he had gone to exact an accounting with Shirley as to the \$14,000 she had purportedly received from Dr. Teed. The following conversation was had between them (R. 124).

"Q. What conversation did you have with her at that time?

A. I told her I heard we were all going to be arrested that day.

Q. Was Clayton there?

A. Yes, sir; and I told him also.

Q. What did they say?

A. They couldn't believe it. They wanted to

know where I found it out, and I told them, and he suggested to Shirley we get in the car and go up to see Dr. Teed and find out if he had told the authorities, and she agreed to do it."

That Wesley Doores, who was not charged as a conspirator or in any of the substantive counts, testified as follows concerning the first joint meeting attended by Clayton, Shirley Doores, Edward William Kelly and Wesley Doores on April 9, 1944. (R. 140, 141 and 142):

"Q. Who else was at the house besides you and George Clayton and Kelly?

A. My sister Shirley was there.

Q. When you say 'George', do you mean the defendant, George Clayton?

A. Yes, sir.

Q. Tell us anything that George Clayton said out there with reference to this doctor at Coeur d'Alene during that evening at any time.

A. Well, after dinner out there, we was talking, and George said he had a good score at Coeur d'Alene if he could get one of us to go on it, and Kelly asked what it was, and George Clayton explained that Shirley had been getting prescriptions from Dr. Teed at Coeur d'Alene, and he had been writing them in a fictitious name, and if some one would impersonate a federal man he could take the doc for some money, and he wanted me to go over and I wouldn't go, and Kelly asked what he thought the doc would come up with, and he told him oh, \$800 or \$1000,

somewhere around there, I don't remember the exact amount, and Kelly asked him if he thought there would be any trouble, and George told him no, there wouldn't be any, and so Kelly agreed to go over there.

Q. What, if anything, was said by any of you as to how this transaction would be carried out and who said it, as you recall?

A. George went on to explain to Kelly at the same time after Kelly consented to go, he would drive him over, and Shirley was to go up to the doc's office and Kelly would come in a few minutes later, and Shirley would see Kelly and tell the doc that was a federal man in the waiting room.

Q. Was any name for the federal man used?

A. Graven, Mr. Graven, and that Kelly was supposed to tell the doc his name was Graven, and he was over there to check narcotic prescriptions, and it was pretty bad for the doc.

Q. Was your sister present at this conversation?

A. Yes, sir.

Q. Can you tell us whether or not the name Mike Sanders was used there?

A. That was one of the fictitious names she used.

Q. What?

A. That was one of the fictitious names the doctor had used in writing prescriptions.

Q. Did your sister talk about that name that night?

A. George and Shirley both talked about it.

Q. What was said about how much money they expected to get out of this man?

A. Then George said he thought the doc could be taken for \$800 or \$1000.

Q. Who asked him about that?

A. Kelly did.

Q. Was there anything further said there that you can recall at this time?

A. George said he would drive them over next morning, but after talking about it he decided against driving them over. He said, 'If there should be any trouble over there I wouldn't want my car to be seen over there.' "

That he saw both Shirley Doores and George Clayton several days after this meeting and that Clayton exhibited quite a few hundred dollars in a bill fold and said:

"That ain't all I have got. I have some of the little white tablets. He always referred to narcotics as little white tablets." (R. 148).

Several weeks thereafter George Clayton showed this witness what he said to be \$6000 in cash and mentioned that he was going to Pasco to open a gambling joint (R. 149). That on or about the 17th or 18th of May, Kelly had stated to Wesley Doores

that he, Kelly, had ascertained from the doctor at Coeur d'Alene that George Clayton and Shirley Doores had been paid \$14,000 and that he was going to demand his part of it. (R. 151). That several days later George Clayton personally called this witness on the phone and stated to him:

" 'You and that other rat'—meaning Kelly—'better keep your mouth shut' and he said, 'If you know what is healthy for you you had better get out of town, or I will bury you at Walla Walla. You know you are on parole and it wouldn't be hard for me to do.' " (R. 152).

Erick R. Erickson, Assistant Cashier at the Old National Bank in Spokane testified that George T. Clayton maintained a checking account there (R. 272). That a deposit was made by George Clayton under date of April 12, 1944, for \$1050 (R. 272), and a deposit of \$2000 on May 1, 1944. (Plaintiff's exhibits 32 and 33—R. 64). Exhibit No. 31 (R. 63) indicates that between the period of March 27, 1944 and July 21, 1944 the said amounts of \$1050 and \$2000 respectively were the only amounts deposited by George Clayton in said account, with the exception of \$89.00 deposited on June 15, 1944. (R. 63).

Nora McHargue, bookkeeper and teller, Spokane Valley State Bank, testified that on May 18, 1944, George Clayton made a final payment of \$1251.48 in cash to that institution on a contract for the purchase of real estate hereinbefore described at E. 7225 Carlisle Avenue (R. 330 and 331).

George Heglar, used car manager for the Barton Automobile Company, Spokane, Washington, testified that on the 2nd day of May, 1944, Shirley Doores purchased an Oldsmobile automobile from his company for which she paid cash in the sum of \$1644.10 (R. 357, 358).

Wayne Bezona, United States Marshal for the Eastern District of Washington, testified that on the 29th day of May, 1944, he removed the sum of \$5950.00 in cash from the safe deposit box maintained at the Old National Bank in Spokane, Washington, by Shirley Doores under the name of Vera Wilson. (R. 385, 386).

The above amounts of cash approximate the \$14,000 paid by Dr. Teed to Shirley Doores. The jury had a right to believe that these sums constituted a portion of the extortion money paid by Dr. Teed, and that they had a right to consider that these sums added together approximated the amount extorted from Dr. Teed.

It is a generally accepted rule as set forth fully in *Brickey vs. United States*, 123 F. (2nd) 341, and *West vs. United States*, 113 F. (2d) 68, that a conviction may be sustained by the uncorroborated testimony of an accomplice alone, although that testimony may be subject to close scrutiny and minute examination.

In the case at bar, not only do we have the testimony of an accomplice and co-conspirator, Edward

William Kelly, but we also have the testimony of Wesley Doores, not charged as a co-conspirator, but an accomplice, and many and varied items of circumstantial evidence tending thoroughly to corroborate the testimony of the co-conspirator, Edward William Kelly. We respectfully submit that the evidence as to this appellant is clear and convincing beyond all reasonable doubt, and was before the jury and considered upon correct instructions from the Court which were not excepted to by the appellant Clayton.

The appellant has alleged in his appeal that the evidence submitted was as consistent with innocence as with guilt, and therefore insufficient to sustain a conviction. Several cases are cited by him to prove the rule. We have no argument with the rule that if the evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse the conviction. Such rule, however, cannot be applied in this particular set of facts, since the evidence submitted so overwhelmingly implicates the appellant as a conspirator that it is not capable of two interpretations.

## ARGUMENT AND ANSWER TO APPELLANT'S SPECIFICATION OF ERRORS 3 AND 4.

Appellant assigns as prejudicial error, the remarks of the United States Attorney in his closing statement to the effect that:

"Shirley Doores will not lie for anyone. \* \* \* You are dealing with the people of the underworld, don't forget that for a moment. \* \* \* Kelly was man enough to plead guilty and testify, and there was nothing I could offer him. The penalties in this Court are fixed by the Court alone, District Attorneys are not even allowed to make recommendations as to penalties."

It is respectfully submitted that there was nothing inflammatory about the above remarks or in the manner of their utterance which bring it within the rule laid down by the United States Supreme Court in *Viereck v. United States*, 318 U. S. 236. At page 247 the Court stated:

"In his closing remarks to the jury he indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice."

Passion and prejudice as used in the Opinion refer to those unusual emotions stirred by the bitterness occasioned by participation in World War II.

The rule is further enunciated in *Berger v. United States*, 295 U. S. 78. At page 89 the Court stated:

"Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

It is well to note, however, that even though the intemperate and prejudicial remarks of the United States Attorney were considered by the Court to be of an extremely serious nature, the Supreme Court pointed out that the case against Berger was weak and that:

"If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming', a different conclusion might be reached."

Certainly the remarks of the District Attorney in that case far exceed in their prejudicial nature any of the remarks of the United States Attorney in the case at bar, and in addition we submit that the evidence as to the appellant here is strong and "overwhelming," as that word is used in the quotation cited above.

We believe that these statements come within the standard laid down in *Tatum v. United States*, 146 F. (2d) 406, a very recent decision of the Ninth Circuit and come within the boundaries of fair argument as indicated therein.

With reference to the statement of the United

States Attorney that Kelly was man enough to plead guilty and testify and there was nothing he could offer him, and that penalties of the Court were fixed by the Court alone—the District Attorney not being allowed to make recommendations as to penalties—we respectfully submit that this is nothing more than the statement of the practice instituted by Judge Schwellenbach in the District Court for the Eastern District of Washington, and as explained by him in his opinion. (R. 23).

Considered in their entirety, we submit that these comments do not constitute prejudicial error.

## ARGUMENT AND ANSWER TO APPELLANT'S SPECIFICATION OF ERROR NO. 5

Appellant contends that prejudicial error was committed when the Court permitted the District Attorney to argue to the jury over appellant's objection that the defendant had failed to call as a witness in his own behalf the co-defendant, namely, Shirley Doores, who had entered a plea of guilty prior to commencement of the trial, but upon whom judgment had not been passed.

The rule applicable here, it is respectfully submitted, is that if the party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. *Graves v. United States*, 150 U. S. 118.

The rule is well stated by Justice L. Hand in *United States v. Cotter*, 60 F. (2d) 689 (287 U. S. 666, certiorari denied) at 691 and 692:

“When both sides fail to call a witness who knows something of the facts, their conduct, like anything else they do, is a circumstance which a jury may use. If both can call him and he is impartial, ordinarily it will have little weight; if it appear that he would naturally side with one party, it is reasonable to expect that he does not use him for good reason; and that is fair argument for the other. More so, if he is only available to one who alone knows the facts, and there is no other evidence on the issue.”

In *Milton v. United States*, 110 F. (2d) 556, at 559, the case of *United States v. Cotter, Supra*, is cited with approval, stating:

“... if the witness is available to the accused and not to the government and is informed concerning facts material to the case, the presumption arises from his unexplained absence that the accused had good reason for not calling him, and this may properly be argued against him.”

In *Lowrey v. United States*, 128 F. (2d) 477, at 479 and 480, the point in issue was whether or not a Federal Officer of the Alcohol Tax Unit had an understanding with local police officers for alleged violation of liquor laws. A former policeman had testified that on the occasion of the acquittal of the defendant in a state court, one of the state officers had said in the presence of the Federal Officer: “We’ll get him again for you,” to which the Federal Officer replied: “All right”. This agent was a witness for the Government in the trial of appellant where the question of the lawfulness of the seizure of the liquor was in issue. He was not called by the Government to deny the testimony of the witness. The Court, speaking through Judge Riddick, said:

“It is also significant that the testimony of the witness Outler (former local officer) is not denied by the federal officer with whom the agreement is supposed to have been made. That officer was a witness for the government in the court below and, so far as the record goes, was available to refute Outler’s testimony. This testimony was material for, if true, it required the suppression of the government’s evidence. In

such circumstances the unexplained failure of the government to place the witness Gibson on the stand justifies the inference that his testimony, if presented, would have been unfavorable to the prosecution. *Lincoln National Life Insurance Company v. Erickson*, 8 Cir., 42 F. (2d) 997; *Mammoth Oil Company v. United States*, 275 U. S. 13, 48 S. Ct. 1, 72 L. Ed. 137."

In *Interstate Circuit v. United States*, 306 U. S. 208, at pages 225, 226, the Court, in part, stated as follows:

"The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Clifton v. United States*, 4 How. 242, 247. Silence then becomes evidence of the most convincing character. *Runkle v. Burnham*, 153 U. S. 216, 225; . . ."

The above cases were cited in *United States v. Aluminum Co. of America*, 44 F. Supp. 97, at page 275:

"As said with respect to a person having an attitude friendly to one side, such as Mr. Van Alstyne must be assumed to have had at least toward Aluminum, his silence would be 'a proper subject of comment'. *Kirby v. Tallmadge*, 160 U. S. 379, 383, 16 S. Ct. 349, 350, 40 L. Ed. 463. As also said, it would be 'permissible' to infer that he was not in position to deny what

had been ascribed to him (*Northern Railway Co. v. Page*, 274 U. S. 65, 74, 47 S. Ct. 491, 71 L. Ed. 929); it would be ‘persuasive’ that, if he had testified, what he said would have been unfavorable (*Interstate Circuit v. United States*, 306 U. S. 208, 226, 59 S. Ct. 467, 83 L. Ed. 610); and it would be fair argument for the other side. *United States v. Cotter*, 2 Cir., 60 F. (2d) 689, 692.”

The dissenting opinion of Mr. Justice Black in *Sewart v. Southern Ry. Co.*, 315 U. S. 283, at page 289, is respectfully submitted, not with the thought that this Court ordinarily would be influenced by a dissenting opinion, but for the reason that the particular rule under inquiry is not discussed in the majority opinion in that case.

The action was one in tort based upon an alleged defective coupling on a railroad car. The language is as follows:

“Moreover, since there was a statutory duty not to continue using this particular pin lifter if it was defective, we can reasonably assume that the railroad’s inspectors made some examination of it. Yet no inspector nor anyone else was called by the railroad to give testimony on the condition of the pin lifter immediately after the accident. Under these circumstances, reasonable jurors are not to be denied the right to make inferences which other reasonable people would make; that Stogner tried in the usual way to couple the cars; that his efforts were unsuccessful; and that he was therefore compelled to go between the cars to effect a coupling. And they could therefore have concluded that the pin lifter was defective. The jury’s finding of this fact should not have been disturbed.”

The rule is as applicable in criminal cases as it is in civil cases, both for the prosecutor as well as for the accused. *Wigmore On Evidence*, Volume II, paragraph 290.

In the case at bar, it must be remembered that the entire defense was an attack upon the testimony of the witnesses Edward William Kelly and Wesley Doores, each of whom testified that they, Shirley Doores and the appellant conceived and executed a conspiracy. The unlikelihood of their story, the lack of credibility attached to the witness Wesley Doores, and his instability as a witness constituted the entire defense in this case, and was carried into the argument by each of the counsel who addressed the jury for the appellant.

The testimony is uncontradicted that appellant and Shirley Doores lived together in a common law relationship; that they had occupied the home on Carlisle Avenue since September 1943; that they were more or less constantly together in Spokane and other places during that period. It cannot successfully be urged that Shirley Doores was in a closer relationship to the government than she was to her common law husband, the appellant. There was every reason for the government to be skeptical about calling her as a witness. She was called for one purpose only—to establish the fact that she was not the legal wife of appellant. During the interrogation and admonition by the Court as to her right not to testify and thereby incriminate herself, she indicated she

would not testify, (R. 362) even to the extent of answering the question as to whether she had ever been married to appellant. This was in the absence of the jury. When the trial resumed before the jury, the question was put to her, following instruction by the Court that she could claim her privilege in front of the jury, and surprisingly she answered the question by stating "no" when asked if she had ever been married to appellant.

If appellant was not a party to the conspiracy, as outlined by government witnesses Kelly and Wesley Doores in which they included appellant and Shirley Doores with themselves as co-conspirators, Shirley Doores by virtue of her common law relationship with appellant was more available to him than to the government. The reasonable expectation is that if Kelly and Wesley Doores were not telling the truth about the formation of the conspiracy to extort money from Dr. Teed, Shirley Doores was the one person in addition to appellant whose testimony might rebut that of the two government witnesses. Mr. Gleeson, one of appellant's attorneys, stated repeatedly during the admonition to Shirley Doores by the Court, that, "she might be a witness, that they had not yet decided whether she would be a witness." If Mr. Gleeson, in his dual role as attorney for appellant and Shirley Doores, felt influenced by his duty to Shirley Doores to instruct her not to testify to anything which might incriminate her, he could have instructed his client as to her rights, placed her on the stand and let her refuse to testify because of the dan-

ger of self-incrimination. His failure to do this left the inference that Shirley Doores would tell the truth and that the truth would be adverse to the appellant.

One convicted of a crime testifying as a witness, either for the government or for the defendant, was first passed upon in *United States v. Reid*, 12 How. 361 (1851). The competency of a co-defendant who has plead guilty was determined adversely to defendant's claim in *Benson v. United States*, 146 U. S. 325.

The two cases are fully discussed in *Rosen v. United States*, 245 U. S. 467. The language of the Court in that case is significant:

“Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved.”

In the above case one, Broder, was indicted with Rosen. He entered a plea of guilty, and was sentenced. He was later called as a witness for the government.

In *Funk v. United States*, 290 U. S. 371, the Court had before it the question of whether or not the wife of a defendant on trial for a criminal offense was a

competent witness in his behalf. In the course of its opinion the Court referred to the *Benson* and *Rosen* cases *Supra*, and traced the development of the rules of evidence disqualifying as witnesses persons having an interest in the subject matter. With reference to a co-defendant on trial it stated this question on page 377 of the opinion:

“‘... If interest and being party to the record do not exclude a defendant on trial from the witness stand, upon what reasoning can a co-defendant, not on trial, be adjudged incompetent?’”

Mr. Justice Sutherland states the modern adaptation of the rule to be as follows, page 380:

“The rules of the common law which disqualified as witnesses persons having an interest, long since, in the main, have been abolished both in England and in this country; and what was once regarded as a sufficient ground for excluding the testimony of such persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. Whatever was the danger that an interested witness would not speak the truth—and the danger never was as great as claimed—its effect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances. The modern rule which has removed the disqualification from persons accused of crime gradually came into force after the middle of the last century, and is today universally accepted.”

See also, *Wigmore On Evidence*, Volume II, paragraphs 285, 286, 287, 288 and 290.

Appellant cites *Hopkins v. State*, 146 Pac. 917, as authority for the proposition that the government's comment on the failure of the defendant to introduce as witnesses in his behalf co-defendants not on trial constitutes reversible error. This is an Oklahoma case, and the ruling of the Court is based upon the statute of that state (5880, Revised Laws) to the effect that when two or more persons are included in the same indictment or information, and the Court is of the opinion that as to a particular defendant there is not sufficient evidence to put him on his defense, the Court must, before the evidence is closed, submit its opinion to the jury, and the jury acquit the defendant in order that said defendant may be compelled to be a witness for his co-defendant. The Prosecuting Attorney in his argument to the jury commented on the failure of a co-defendant to take the stand on behalf of the defendant, stating specifically: "They had a right to call him." The Court held, and we believe rightly, that the Prosecuting Attorney had misquoted the above Oklahoma statute in that the co-defendant had not been acquitted by the jury, and therefore could not be compelled to testify for the defendant on the ground that he was still a co-defendant and had an interest in the case, and could not be compelled to incriminate himself.

The Court did state in its opinion that: "Considering the doubtful character of the testimony against the defendant we think the remarks prejudicial."

We respectfully call the Court's attention to Gor-

*man v. State*, 92 Pac. (2d) 1086, at page 1096, a very recent Oklahoma case in which *Hopkins v. State, Supra*, was considered in the opinion, and which announces the general rule in Oklahoma against an attorney for the State commenting on failure of the defendant to produce testimony of a co-defendant as not legitimate argument, in which the Court in rendering its judgment stated:

“Unless the case is close on the facts and this misconduct may have influenced the verdict, it is not necessarily reversible error.”

Both *Duncan v. State*, 2 Pac. (2d) 285 and *Hancock v. State*, 241 Pac. 1108, cited by appellant are also Oklahoma cases and conform to the rule as above set forth.

The appellant also cites *Moyer v. United States*, 78 F. (2d) 624, a Ninth Circuit case, wherein it is stated that the rule should not be applied in the case of one who might be called as a witness who is a co-defendant and has entered a plea of guilty, and as to whom the sentence has not been imposed.

It is true this case standing by itself would appear to be supporting authority for contention of the appellant. As pointed out, however, very aptly by Judge Schwellenbach in his opinion of the Court, the weakness of the *Moyer case* is that it refers specifically to *Alford v. United States*, 282 U. S. 687 in connection with the statement of the rule as above set forth, stating specifically:

"Of one in that position the Supreme Court in *Alford v. United States, Supra*, page 693, said: 'Nor is it material as the (Circuit) Court of Appeals (41 F (2d) 157) said, whether the witness was in custody because of his participation in the transactions for which petitioner was indicted. Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross examination that his testimony *was affected by fear or favor growing out of his detention . . .*'"

Therefore, the reason the Court in the Moyer case had for excluding the rule in the case of unsentenced co-defendants was its belief that the testimony of such unsentenced co-defendants might be affected by fear or favor growing out of detention. That such a reason cannot exist in Judge Schwellenbach's Court, and particularly in the trial of this case is best said by Judge Schwellenbach in his opinion of the case (R. 23) wherein he announces the policy steadfastly maintained in his Court. The advice of the United States Attorney, or his recommendation, is not permitted either publicly or privately, and that the appellant's attorneys were cognizant of that rule by reason of their frequent appearances in the Court. As aptly pointed out by Judge Schwellenbach (R. 23):

"They (appellant's attorneys) were entirely familiar with the rule. They and the defendant and Shirley Doores knew that she had nothing to fear and that she could expect no favors as a result of her testimony had she taken the stand."

It is also respectfully pointed out in the *Moyer*

case, *Supra*, that, as expressed by Judge Norcross in his opinion, page 630:

"Where, as in this case, the only witness available who was not called was equally accessible to both the prosecution and the defendant on trial, the rule is that no unfavorable inference can be drawn against either the prosecution or the defense by reason of a failure to call such witness. *Egan v. United States*, 52 App. D. C. 384, 287 F. 958, 969; *Grunberg v. United States* (C. C. A.) 145 F. 81, 88; 16 C. J. 541; *Sacramento Suburban Fruit Lands Co. v. Boucher* (C. C. A.) 36 F. (2d) 912."

As hereinbefore pointed out that situation did not exist in this case.

It is respectfully submitted, therefore, that there can be no question that Shirley Doores was not only accessible to the appellant as a witness, but was peculiarly available to him as a witness against the government. It is further respectfully submitted that Shirley Doores was not accessible or available as a witness to the Government within the purview of the rule for reasons hereinbefore set out. Therefore, the general rule that comment may not be made by an attorney upon the fact that a witness equally available to both plaintiff and defendant did not testify in the other parties' behalf is not applicable here.

It is respectfully submitted that the evidence produced by the government against the appellant was strong and overwhelming in contrast to those cases where the above general rule has been applied and accepted, due primarily to the weak and insufficient evidence presented against the defendant.

## ARGUMENT AND ANSWER TO APPELLANT'S SPECIFICATION OF ERROR NO. 6

Appellant further alleges in Specification of Error No. 6 that the trial Court erred in further instructing the jury upon the subjects of conspiracy and circumstantial evidence at the request of plaintiff's attorney and over the objections of appellant. From the reading of the instructions given prior to the additional instructions on conspiracy and circumstantial evidence, it is clear that the trial judge did not fully define the meaning of the term "overt acts". The instruction as originally given may well have caused the jurors to believe that it was necessary for the appellant to have performed personally or participated in one of the several overt acts. Such is not the law, and the additional instruction properly corrected the charge as initially given to the jury.

As to the additional instruction on circumstantial evidence, the initial instruction as given by the Court would likely have excluded all direct evidence of the existence of the conspiracy from their consideration. The additional instruction pointed out that the government was basing its case upon both direct and circumstantial evidence, and that both could be considered by the jurors. This additional instruction was right and proper in correcting an initial instruction which might have caused the jurors to limit their consideration to circumstantial evidence.

It is respectfully submitted that granting or re-

fusing to grant additional instructions is wholly within the discretion of the Court. Nothing is contained in the additional instructions which would tend to accentuate or give undue prominence to any particular phase of the instructions as a whole, and certainly none of the additional instructions serve to accentuate and emphasize the testimony of the defendants Kelly and Wesley Doores, as urged by the appellant.

It is respectfully submitted that the verdict of the jury and the judgment of the Court is in all respects sound and should be affirmed.

*Edward M. Connelly*  
EDWARD M. CONNELLY,

*Harvey Erickson*  
HARVEY ERICKSON,  
United States Attorney

*Frank R. Freeman*  
FRANK R. FREEMAN,  
Assistant United States Attorney

*Frank R. Freeman*  
FRANK R. FREEMAN,  
Assistant United States Attorney

Attorneys for Appellee



No. 10973

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

JOHN EDWARD YATES,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Northern District of California.

Southern Division

FILED

MAR 26 1945

PAUL P. O'BRIEN,  
CLERK



No. 10973

---

United States  
Circuit Court of Appeals  
for the Ninth Circuit.

---

JOHN EDWARD YATES,  
Appellant.  
vs.

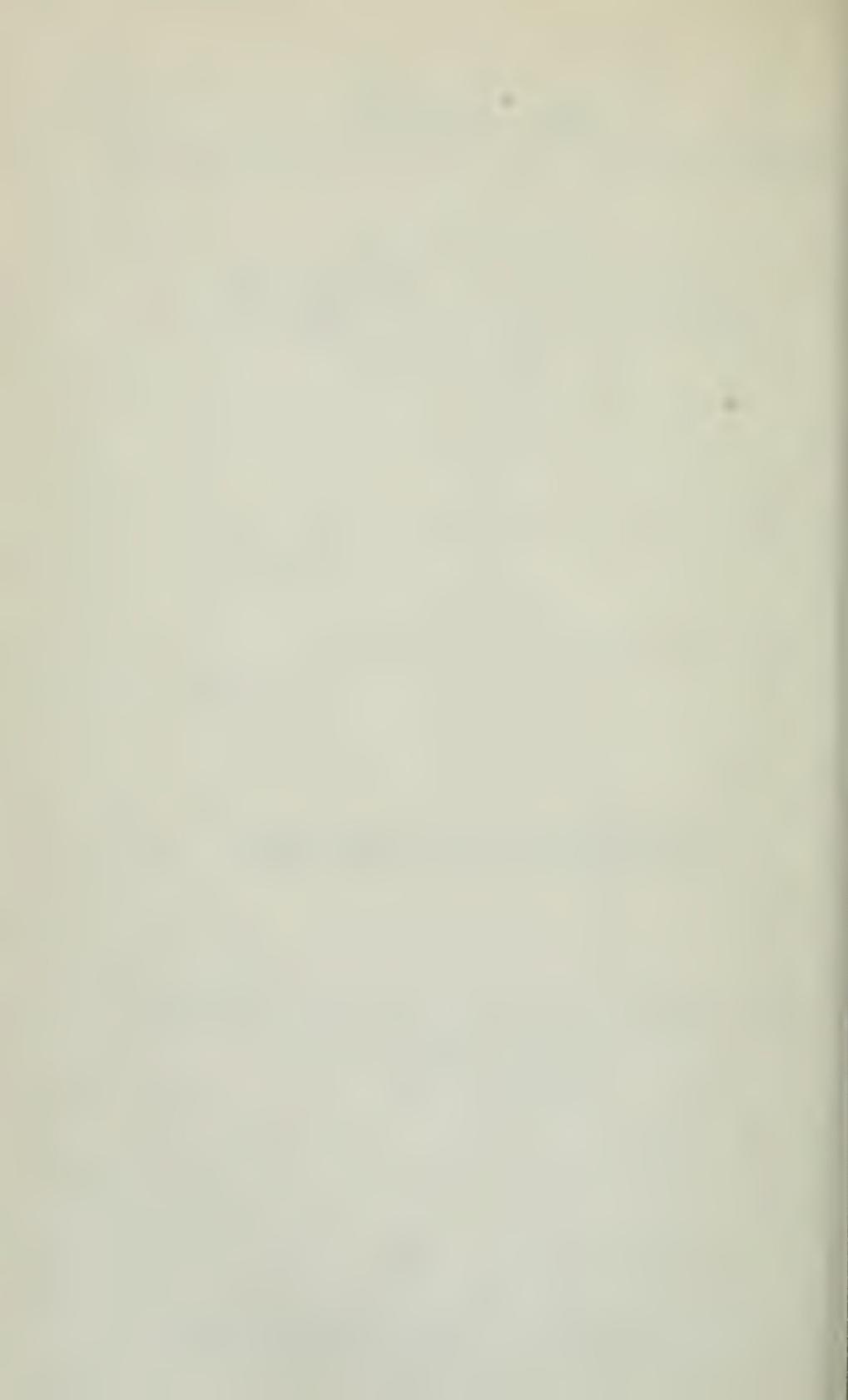
UNITED STATES OF AMERICA,  
Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the Northern District of California.  
Southern Division



## INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Adoption by Appellant of Assignment of Errors as his Points on Appeal.....	104
Appeal:	
Adoption of Assignment of Errors as Points on.....	104
Certificate of Clerk to Transcript of Record on .....	103
Cost Bond on.....	15
Notice of .....	11
Praeceipe of Record on.....	102
Appearance of Louis R. Mercado.....	14
Arraignment and Plea of Not Guilty.....	4
Assignment of Errors.....	97
Bill of Exceptions, Proposed.....	23
Instructions to the Jury.....	62, 74
Stipulation of Facts.....	24
Stipulation re Proposed Bill of Exceptions	97

Index	Page
<b>Witnesses for the Defendant:</b>	
Abrams, Sol	
—direct .....	88
—cross .....	95
Birmingham, David J.	
—direct .....	82
De Lora, John R.	
—direct .....	59
—cross .....	60
Gaynor, Augustine F.	
—direct .....	77
—cross .....	81
Jones, Thomas F.	
—direct .....	84
Yates, John Edward	
—direct .....	47
—cross .....	55
—recalled, direct .....	86
<b>Witnesses for the United States:</b>	
Bolduc, Robert A.	
—direct .....	26
—cross .....	27
Collins, William A.	
—direct .....	38
—cross .....	42
—redirect .....	45

Index	Page
Witnesses for the United States—(Contd.)	
Ehman, Herbert J.	
—direct .....	25
—cross .....	25
Olsen, Henry Frederick	
—direct .....	27
—cross .....	31
—redirect .....	38
Picard, Roland	
—direct .....	45
—cross .....	46
—redirect .....	47
Certificate of Clerk to Transcript of Record on	
Appeal .....	103
Cost Bond on Appeal .....	15
Indictment .....	2
Instructions:	
Proposed by the Government.....	100
Proposed by the Defendant .....	101
Judgment .....	10
Minute Entries:	
Mar. 11, 1944—Arraignment and Plea of Not Guilty.....	11
Mar. 21, 1944 Trial.....	5
Mar. 22, 1944—Trial and Verdict of Guilty	7

## Index

## Page

## Minute Entries—(Continued)

	Page
Mar. 23, 1944—Motion for New Trial and Judgment and Sentence.....	9
Mar. 30, 1944—Order Refiling and Settling Proposed Bill of Exceptions.....	13
May 3, 1944—Hearing on Matter of Settlement of Proposed Bill of Exceptions, etc.	20
May 4, 1944—Further Hearing on Settlement of Bill of Exceptions.....	21
May 22, 1944—Proposed Bill of Exceptions Ordered Settled and Allowed.....	22
<b>Motion for New Trial and Judgment and Sentence .....</b>	<b>9</b>
Names and Addresses of Attorneys of Record .....	1
Notice of Appeal.....	11
Order Extending Time to File Bill of Exceptions .....	18
Order Setting Time to Settle and File Bill of Exceptions .....	14
Order Setting Time to Take Testimony on Bill of Exceptions .....	20
Orders Settling and Allowing Proposed Bill of Exceptions .....	22, 23
Praecipe of Record on Appeal.....	102
Sentence .....	10
Specifications of Error.....	97
Verdict of Guilty.....	9

## NAMES AND ADDRESSES OF ATTORNEYS

A. J. HENNESSY, Esq.,

269 Pine Street,  
San Francisco, California.

LOUIS R. MERCADO, Esq.,

1095 Grant Building,  
San Francisco, California.

Attorneys for Defendant and Appellant.

FRANK J. HENNESSY, Esq.,

United States Attorney,  
Northern District of California.

JAMES T. DAVIS, Esq.,

Assistant United States Attorney,  
Northern District of California.  
Post Office Building  
San Francisco, California.

Attorneys for Plaintiff and Appellee.

In the Southern Division of the United States District Court for the Northern District of California.

Title 18 USCA Section 455;

In the March 1944 term of said Division of said District Court, the Grand Jurors thereof, upon their oaths, present: That

**JOHN EDWARD YATES**

(hereinafter called the defendant) on or about the 4th day of February, 1944, in and on board a certain American vessel known as and called the "President Johnson", belonging in whole or in part to the American President Lines, Inc., a corporation created by and under the laws of the State of Delaware, on waters within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state of the United States, to-wit, at Purvis Bay Florida Island, Solomon Island Group, then and there being, with a knife or some sharp instrument, a more particular description of said knife or instrument being to the Grand Jurors unknown, then and there unlawfully, feloniously, wilfully with malice aforethought, and with intent to kill Henry Frederick Olsen, did assault, beat, strike, cut and stab said Henry Frederick Olsen, a male human being, with said knife or sharp instrument, in the side and arm and elsewhere in and upon the body of said Henry Frederick Olsen.

That after the commission of the aforesaid offense by said defendant, the said defendant was first brought into and was found in the City and County of San Francisco, California, within the Southern Division of the Northern District of California, and within the jurisdiction of this court.

FRANK J. HENNESSY

Frank J. Hennessy

United States Attorney [1]

Approved as to Form:

RB McM.

[Endorsed]: Presented in Open Court and Ordered filed, Mar. 8 1944. [2]

---

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Saturday the 11th day of March, in the year of our Lord one thousand nine hundred and forty-four.

---

\*Page numbering appearing at foot of page of original certified Transcript of Record.

Present: The Honorable A. F. ST. SURE,  
District Judge.

NO. 28423

UNITED STATES OF AMERICA,

vs.

JOHN EDWARD YATES.

ARRAIGNMENT AND PLEA OF NOT GUILTY

This case came on this day ex parte. The defendant John Edward Yates was present in the custody of the United States Marshal and with his attorney Sol A. Abrams, Esq., James T. Davis, Esq., Assistant United States Attorney was present on behalf of the United States.

On motion of Mr. Davis, the defendant was called for arraignment. The defendant was informed of the return of the Indictment by the United States Grand Jury, and asked if he was the person named therein, and upon his answer that he was, and that his true name was as charged, said defendant was informed of the charge against him and stated that he understood the same. Mr. Abrams waived the reading of the Indictment.

The defendant was called to plead and thereupon said defendant entered a plea of "Not Guilty" to the Indictment, which said plea was ordered entered. [3]

After hearing the Attorneys, it is ordered that this case be continued to March 21, 1944, for trial before Hon. Martin I. Welsh, District Judge.

Ordered that the amount of bail be reduced from \$5000.00 to \$2500.00.

Further ordered that in default of bail defendant be remanded into the custody of the United States Marshal and that a writ issue. [4]

---

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday the 21st day of March, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh,  
District Judge

[Title of Cause.]

No. 28423

TRIAL

This case came on regularly this day for trial. The defendant John Edward Yates was present in Court with Sol A. Abrams, Esq., his attorney. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States. Thereupon the following persons, viz:

Mrs. Rita Abrams	Mrs. Gessel Coleman
Helen F. De Paoli	Roland R. Mack
Mrs. Elsie O. Taylor	David A. Lord
Augustine F. Gaynor	Stanley R. Dickover
Rebecca Silverstein	David J. Birmingham
Earl R. Sewall	Mrs. Rose Baron.

twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Davis made a statement to the Court and jury on behalf of the United States. Mr. Abrams made a [5] statement to the Court and Jury on behalf of the defendant. Hobart J. Ehman, Robert A. Bolduc, Henry F. Olson, William A. Collins and Roland F. Picard were sworn and testified on behalf of the United States. Mr. Davis introduced in evidence and filed U. S. Exhibit No. 1. Thereupon the United States rested. John Edward Hayes and John R. DeLora were sworn and testified on behalf of the defendant. Defendant then rested his case. The evidence being closed, and after hearing Mr. Davis and Mr. Abrams, the Court ordered that this case be continued to March 22, 1944, at 10:30 a. m., and the jury, after being duly admonished, was excused until that time. [6]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 22nd day of March, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh,  
District Judge.

NO. 28423-S

UNITED STATES OF AMERICA,

vs.

JOHN EDWARD YATES.

TRIAL AND VERDICT OF GUILTY

The parties hereto and the jury heretofore impaneled herein being present and complete, the further trial of this case was this day resumed. After argument by the attorneys and the instructions of the court to the jury, the jury at 2:25 p.m. retired to deliberate upon their verdict. At 3:30 p.m. the jury returned into court and upon being asked if they had agreed upon a verdict, replied in the negative. After further instructions by the court to the jury, the jury at 3:35 p.m. again retired to deliberate upon their verdict. At 4:40 p.m. the jury returned into court and upon being

asked if they had agreed upon a verdict, replied in the affirmative and returned the following verdict, which was ordered, viz:

"We, the Jury, find John Edward Yates, the defendant at the bar, Guilty of an assault with a deadly weapon.

AUGUSTINE F. GAYNOR,  
Foreman." [7]

The jury upon being asked if the verdict as recorded was its verdict, each juror replied that it was. Ordered that the jury be excused from the further consideration of this case and from attendance upon the court until further notice.

The defendant was called for judgment. After hearing Mr. Abrams and Mr. Davis, it is ordered that this case be continued until March 23, 1944, at 12 o'clock noon, for the pronouncing of judgment on the defendant herein. It is further ordered that the defendant be and he is hereby remanded into the custody of the United States Marshal and that a mittimus issue herein accordingly.

It is further ordered that the bond heretofore given for the appearance of the defendant herein be, and the same is hereby exonerated and the sureties thereon discharged. [8]

District Court of the United States, Northern District of California, Southern Division

No. 28423

THE UNITED STATES OF AMERICA,

vs.

JOHN EDWARD YATES

We, the Jury, find John Edward Yates, the defendant at the bar, Guilty of an assault with a deadly weapon.

AGUSTINE F. GAYNOR  
Foreman.

[Endorsed]: Filed Mar. 22, 1944. [9]

---

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday the 23rd day of March, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh,  
District Judge.

[Title of Cause.]

No. 28423-S

**MOTION FOR NEW TRIAL AND JUDGMENT  
AND SENTENCE**

This case came on regularly this day for the pronouncing of judgment. The defendant John Edward Yates was present in the custody of the United States Marshal and with Sol A. Abrams, Esq., his attorney. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendant was called for judgment. Mr. Abrams made a motion for a new trial, which said motion was ordered denied. Mr. Abrams made a motion that the defendant be placed on probation, which said motion was likewise ordered denied. After hearing the defendant and the attorneys, and said defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant John Edward Yates, having been convicted on the verdict of the jury of [10] guilty of the offense charged in the Indictment, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a U. S. Penitentiary.

Mr. Abrams stated to the Court that he was giving the Court an oral Notice of Appeal. Mr. Abrams made a motion for bail for release of the defendant pending appeal, which said motion was ordered denied. [11]

---

[Title of District Court and Cause.]

#### NOTICE OF APPEAL

1. Appellant, John Edward Yates; address, San Francisco County Jail.
2. Offense; assault with intent to kill with deadly weapon.
3. Judgment, entered March 23, 1944.
4. Sentence, 5 years in a Federal Penitentiary.
5. San Francisco County Jail is the place where defendant is now confined.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for

the Ninth Circuit from the judgement above mentioned from the grounds set forth below.

JOHN E. YATES

Appellant.

Attorneys for appellant, A. J. Hennessy, 269 Pine Street, and Louis R. Mercado, Grant Building, both of San Francisco. [12]

1. That the indictment does not state a cause of action.
2. That the verdict is contrary to the evidence.
3. That the verdict is contrary to the law.
4. That defendant's motion for a new trial should have been granted.
5. That the Court erred in his instructions to the jury of the law.
6. That the Court erred in not giving defendant's proposed instructions and other instructions on the law of the case.
7. That the Court erred in admitting certain evidence and in excluding certain evidence.
8. That the Court erred in allowing the prosecutor to introduce a prior arrest in evidence and the prosecutor was guilty of misconduct in so doing.
9. That the defendant was denied a trial by jury.
10. That the Court erred in not instructing the jury as to the offense of assault and that they could return a verdict for the same if they so found from the evidence.

11. That defendant was denied the due process of law and was convicted in violation of the provisions of Amendments 3, 4, 5 and 6 of the United States Constitution and other provisions thereof.

[Endorsed]: Filed Mar. 28, 1944. [13]

---

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 30th day of March, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh,  
District Judge.

No. 28423

[Title of Cause.]

**ORDER REFILING AND SETTLING PROPOSED BILL OF EXCEPTIONS**

This case came on this day ex parte, re instructions on record on appeal. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States. Louis R. Mercado, Esq., appeared as attorney for and on behalf of the defendant.

After hearing Mr. Davis and Mr. Mercado, it is

ordered that Mr. Mercado have to and including the 17th day of April within which to file his proposed Bill of Exceptions, and that the 24th day of April, 1944, be and the same is hereby set for settling of the proposed Bill of Exceptions in accordance with an order to be hereafter signed and filed. [14]

---

[Title of District Court and Cause.]

Mr. Clerk:

Enter our appearances as atty's for the deft. in the above-entitled case.

Dated at San Francisco on 28th day of Mar., 1944.

LOUIS R. MERCADO

Grant Bldg. SF

Address A. J. Hennessy, 269  
Pine Street

[Endorsed]: Filed Mar. 30, 1944. [15]

---

[Title of District Court and Cause.]

ORDER SETTING TIME FOR BILL OF  
EXCEPTIONS

It Is Hereby Ordered that the defendant present his proposed Bill of Exceptions to the United States Attorney on April 17, 1944, and that the Bill of Exceptions be settled on April 24, 1944 at 10:00 o'clock A.M. of said day.

Dated: This 31st day of March, 1944.

MARTIN I. WELSH

United States District Judge.

[Endorsed]: Filed Mar. 31, 1944 [16]

---

No. 28423-S

APPEAL BOND NO. 30381

United States of America,  
Southern Division,  
Northern District of California.—ss.

Know All Men by These Presents:

That we John E. Yates, as principal, and National Automobile Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of California, as Surety, are held and firmly bound unto the United States of America, in the sum of Twenty-five Hundred Dollars (\$2,500.00), to be paid to the said United States of America, certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselfs, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the 29th day of March, in the year of our Lord, One Thousand Nine Hundred and Forty-four.

The Condition of the above recognizance is such, that, whereas, lately at a District Court of the United States for the Northern District of Cali-

fornia in a suit depending in said Court, between United States of America vs. John E. Yates a judgment was rendered against the said John E. Yates and the said John E. Yates having filed in the Clerk's Office of said Court Notice of Appeal in duplicate, from said judgment in the aforesaid suit, and said appeal is now regularly pending in the United States Court of Appeals in and for the Ninth Circuit to be holden at the City of San Francisco in the State of California and Northern District of California,

Now, Therefore, if the said John E. Yates surrender himself in execution of the judgment, upon its being affirmed or modified, or upon the appeal being dismissed, or that, in case the judgment be reversed and the cause be remanded for a [17] new trial and render himself amenable to any and all lawful orders and process in the premises, then this recognizance shall be void, otherwise to remain in full effect and virtue. This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

Acknowledged before me and approved the day  
and year first above written.

[Seal] JOHN E. YATES

451 Hyde St., San Francisco

[Seal] FRANCIS ST. J. FOX

United States Commissioner for the Northern Dis-  
trict of California.

NATIONAL AUTOMOBILE  
INSURANCE COMPANY

[Seal] By B. WATSON

B. Watson, Attorney-in-Fact.

(Verification to bond)

CERTIFIED COPY OF POWER OF  
ATTORNEY

Form of Bond and sufficiency of sureties ap-  
proved.

MARTIN I. WELSH

United States District Judge.

Mar. 30, 1944.

Approved as to form:

W. F. MATHEWSON  
Ass't U. S. Atty.

[Endorsed]: Filed Mar. 31, 1944. [18]

[Title of District Court and Cause.]

**ORDER EXTENDING TIME TO FILE BILL  
OF EXCEPTIONS**

Notice of appeal having been duly filed in the above entitled matter, and it appearing that the trial District Judge is not present in the Southern Division of the Northern District of California; that telephone communication between San Francisco and Sacramento where the trial District Judge has his Court room are disrupted and the parties hereto were unable to contact said judge; that the Defendant reasonably needs thirty days within which to prepare his Bill of Exceptions and good cause appearing therefor,

It Is Hereby Ordered that the defendant John Edward Yates may have thirty days from this date, to and including the 22nd day of May, 1944, in which to prepare, serve and file a Bill of Exceptions to be used upon the appeal in this matter.

Dated at San Francisco, California, April 24, 1944.

**A. F. ST. SURE**

District Judge of U. S. Court for the Northern District of California.

Approved as to Form

**JAMES T. DAVIS**

Ass't U. S. Atty.

United States of America,  
State and Northern District  
of California.—ss.

Louis R. Mercado, being first duly sworn deposes  
and says:

That he is one of the Attorney's for the defendant: that the Trial District Judge is out of the Division; that he can- [19] not be reached at the Court room at Sacramento due to the disruption of telephone communication between San Francisco and Sacramento, he being advised that no information was available as to when he could reach the said Judge by telephone; that the defendant reasonably needs one month within which to prepare, serve and file a Bill of Exceptions to be used upon the appeal in this matter; that one of the reasons being that government attorney was not able due to press of other business to examine defendants proposed Bill of Exceptions and the absence of information requested in a praecipe on file with the clerk of the court.

LOUIS R. MERCADO

Subscribed and sworn to before me this 24th day  
of April, 1944.

[Seal] M. E. VAN BUREN,  
Deputy Clerk, U. S. District Court, Nor. Dist. of  
California

[Endorsed]: Filed Apr. 24, 1944. [20]

[Title of District Court and Cause.]

ORDER SETTING TIME TO TAKE TESTIMONY ON BILL OF EXCEPTIONS

Notice of Appeal Having Been Duly Filed in the Above Entitled Matter, and it appearing to the satisfaction of the Court that testimony should be taken in order for the defendant to prepare his Bill of Exceptions and good cause appearing therefor,

It Is Hereby Ordered: That said testimony be taken on Wednesday, May 3, 1944, at 1:30 P.M. in the court room number 276, Post Office Bldg., San Francisco, and that this notice may be served any time this day.

Dated May 2, 1944.

MARTIN I. WELSH  
U. S. District Judge.

[Endorsed]: Filed May 2, 1944. [21]

---

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh,  
District Judge.

[Title of Cause]

No. 28432

**HEARING ON MATTER OF SETTLEMENT  
OF PROPOSED BILL OF EXCEPTIONS,  
ETC.**

This case came on regularly this day for certain testimony to settle the proposed bill of exceptions. James T. Davis, Esq., Assistant United States Attorney, was present on behalf of the United States. Louis R. Mercado, Esq., appeared as attorney on behalf of defendant. Augustine F. Gaynor, David J. Bermingham and Thomas F. Jones were sworn and testified on behalf of the defendant. Mr. Mercado introduced in evidence and filed defendant's Exhibits Nos. 1 and 2. Ordered that this case be continued to May 4, 1944, at 1:30 P.M. for further hearing. [22]

---

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 4th day of May, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Martin I. Welsh,  
District Judge.

No. 28423

[Title of Cause.]

FURTHER HEARING ON SETTLEMENT OF  
BILL OF EXCEPTIONS—CONCLUDED

The parties hereto being present as heretofore,  
the further hearing hereof was this day resumed.  
John Edward Yates and Sol A. Abrams were sworn  
and testified on behalf of the defendant. Thereupon  
the hearing in this case was concluded. [23]

---

District Court of the United States, Northern Dis-  
trict of California, Southern Division

At a Stated Term of the Southern Division of  
the United States District Court for the Northern  
District of California, held at the Court Room  
thereof, in the City and County of San Francisco,  
on Monday, the 22nd day of May, in the year of  
our Lord one thousand nine hundred and forty-  
four.

Present: The Honorable Martin I. Welsh, Dis-  
trict Judge, sitting in the Northern Division  
of this Court, at Sacramento, California.

No. 28423-S

[Title of Cause.]

PROPOSED BILL OF EXCEPTIONS OR-  
DERED SETTLED AND ALLOWED

This case came on this day ex parte. Louis R.

Mercado, Esq., was present for and on behalf of the defendant. Emmet J. Seawell, Esq., Assistant United States Attorney, was present on behalf of the United States. After hearing Mr. Mercado and Mr. Seawell, it is ordered that the proposed bill of exceptions be and the same is hereby settled and allowed, in accordance with an order this day signed and filed. [24]

---

[Title of District Court and Cause.]

**ORDER SETTLING BILL OF EXCEPTIONS  
ON APPEAL**

Good cause appearing therefore, and upon the stipulation on file,

It is hereby ordered that the within document called defendant's proposed Bill of Exceptions be and the same hereby is settled and allowed of the evidence and proceedings to be used by the parties on the appeal of this case to the Ninth Circuit Court of Appeals.

Dated May 22, 1944.

**MARTIN I. WELSH**

**U. S. District Judge [25]**

---

[Title of District Court and Cause.]

**PROPOSED BILL OF EXCEPTIONS**

Be it remembered, that on March 21 and 22, 1944, the defendant, John Edward Yates, upon his plea

of not guilty, was tried before a jury before Hon. Martin I. Welsh, District Judge, and the jury returned a verdict of guilty of an assault with a deadly weapon; that thereafter a motion was made for a new trial on the grounds of the insufficiency of the evidence to support the verdict and that the verdict was contrary to law, which motion was denied; that thereafter the Court rendered judgment and sentence of five years in a federal penitentiary; that thereafter a hearing was granted to determine certain matters between the Court and jury on May 3 and 4, 1944; that upon the trial and said hearing the following proceedings were had. [26]

### STIPULATION

It was stipulated by and between counsel for the defendant and the government: "That the vessel known as the S. S. 'President Johnson' is an American vessel belonging in whole or in part to the American President Lines, which is a corporation created by and under the laws of the State of Delaware, and also that this occurrence which took place occurred on waters within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State of the United States, to wit, at Purvis Bay, Florida Island, Solomon Islands Group, and that after the occurrence the defendant was first brought into the City and County of San Francisco, within the Southern Division of the United States District Court, and within the jurisdiction of this court.

HERBERT J. EHMAN,

called for the United States.

I am the Captain of the S. S. "President Johnson," and was on February 4, 1944, at which time the "President Johnson" was at anchor in Purvis Bay, Florida Island, Solomon Islands Group. I identify this log as the official log book of the S. S. "President Johnson" for the voyage in question. The first American port the vessel came to subsequent to February 4th was San Francisco. I know both Mr. Yates and Mr. Olsen; they were members of my crew. I made certain entries in the official log book in the regular course of business relating to some trouble that took place between those two men on February 4th.

The log book was introduced in evidence by the government for the limited purpose of showing that the voyage took place. (The log book is marked "U. S. Exhibit 1.")

#### Cross-Examination

Olsen's rating is that of a Boatswain. A boatswain acts as foreman of the sailors. He is a civilian employee and not [27] in the armed forces of the United States. Yates is a messman. A messman is one who works in the petty officers' mess, taking care of the petty officers and serving their meals, like a waiter. Petty officer Olson is superior in rank to Yates, but he is not over him. Olsen has no connection with the steward's department; Yates waits on him as a waiter, but Olsen is not over him in the

(Testimony of Herbert J. Ehman)

line of duty. Olsen is classed as a petty officer; Yates is not; Yates is a civilian employee on the boat.

---

ROBERT A. BOLDUC,

called for the United States.

I am an officer in the United States Army and was assigned on or about February 4, to the S. S. "President Johnson", which is an armed transport; on that day I had occasion to treat a man by the name of Henry Frederick Olsen, a boatswain on the vessel. I made a report at that time concerning my examination and treatment of Mr. Olsen. I identify this report as the one in the official log book of the vessel. Olsen had three incised wounds in the right arm and one incised wound in the right chest with a bruise. Incised means puncture. There was one wound in the upper right arm just above the elbow on the under surface, here, about one inch long, but very deep; it involved some muscle fibers which had been cut through, and from that wound most of the bleeding occurred. The second wound was in the forearm on the upper surface, just below the elbow, and that wound involved the muscle which had been herniated through, and the third wound was down by the wrist on the upper surface of the arm; that wound involved muscle also which had been cut through but not completely, some muscle fibers. These were the three wounds on the arm. Then

(Testimony of Robert A. Bolduc.)

there was an incised wound in the right chest wall which had not penetrated the chest wall, just involved muscles, about an inch and a half in size; just below that there was a bruise. Each of the incised wounds were sutured, taking about 20 sutures in all. [28] Olsen has some residual disability in his right arm.

#### Cross-Examination

Olsen was incapacitated for nine or ten days; he was in the hospital on his back. He returned back to work to light duty and has worked ever since.

---

HENRY FREDERICK OLSEN,

called for the United States.

My occupation is that of seaman. On February 4, 1944, I was working at that task on the "President Johnson" as a boatswain. I first saw Mr. Yates on the morning of February 4, 1944, in the mess room about twenty minutes to eight. The usual men who ate together were there. I should say about fifteen men were there at that time, they were all petty officers aboard the ship, who ate in the mess. I went in the mess room to receive my breakfast, as I did every morning in the mess room, and there are two tables in the mess room, and I sat down at one of them, and I was about five or ten minutes sitting there waiting for breakfast, and I asked Yates where the other messman was, that I was not waited on at that time. And he said

(Testimony of Henry Frederick Olsen.)

"it don't concern me," and so I told him, "If you don't wait on me I will go and get the third steward". I asked him where the other messman was and he told me it was none of my business. I sat down at the table where the other men were and I waited, and I said to Yates, "Aren't you going to wait on us," and he said, "You are no better than anybody else, and you can wait." Then I went and got the third steward, Bill Collins. That is all that happened at that time. After that I went to Third Steward Collins and told him about the mess room, we were not being served that morning, and I sat down at the table, and I said to Yates, "Aren't you going to wait on us?" And he said, "You can wait, you are no better than anyone else," and finally I ordered my breakfast and I was served by Yates, on or about fifteen minutes to eight. I was served by Yates, he gave me my breakfast and threw it in front of me on the table, in a manner something like this (illustrating). [29]

Q. Did he bounce the plate down on the table then? A. Yes.

Q. Did you have any words with him at that time?

A. No, I got up from the table with the intention of hitting Yates, but I did not.

Q. You did not hit him?

A. No, we got engaged in some kind of a scuffle in the corner of the mess room which ended up in the alleyway outside.

(Testimony of Henry Frederick Olsen.)

Q. When you say some kind of a scuffle, what do you mean? Were any blows struck by either party?

A. No.

Q. You both had your arms around each other, wrestling? A. Something like that.

Q. What took place then?

A. We broke away, and he said to me, "What's the matter with you anyway?" And I told him, "Nothing is the matter with me, all we want is some cooperation and service from you which we haven't had since we left San Francisco."

Q. Then what took place?

A. Then I went back into the mess room and finished my breakfast.

I finished my breakfast about five minutes later. Then I got up and went out from the mess room and started to talk to Collins, the third steward, who was standing out in the passageway, about the general run of the mess. Where I was standing in the passageway there is a kind of stairway leading down to the refrigerator, and where I was standing it was about five or six feet wide. The third steward and I were standing about five feet from the entrance to the mess hall. The passageway extends the full length of the ship. The stairway went down to the frigid air box. I was standing at that point with the steward leaning on the railing with my back toward the mess hall. The third steward was standing in the same position I was, side by side leaning on this rail.

(Testimony of Henry Frederick Olsen.)

Q. Now, what took place then, immediately after you were standing there talking to the third steward? What was the next thing that [30] took place?

A. As I was standing there I felt a stab in the right side of my back and also in my arm, and I looked around, and I saw Yates standing there with a kind of a pointed-looking knife in his hand.

Q. You were talking, as you say, and the first thing you noticed—did you hear anything said before you felt this stab in your side? A. No.

Q. You did not hear any words? A. No.

Q. Where was this stab in the side?

A. It was in the right side.

Q. Right side? A. Yes.

Q. Where, in relation to the front or back of your body?

A. It was in the back of my body.

Q. You say you felt this stab A. Yes.

Q. What was the next thing that you did?

A. Well, I turned around so quickly that I squirmed my body something like this, and I looked around, and I saw Yates standing there with this knife. That is all I remember, I run like everything. The knife was a pointed-looking knife, from what I saw of it, I didn't see much of it; it had a blue blade. I couldn't tell you for sure how long the blade was, but approximately it was on or about ten inches—I would say ten or twelve inches. I couldn't say for sure if it was sharp on both sides or pointed, because I just saw it a mere glimpse, and I

(Testimony of Henry Frederick Olsen.)

ran as fast as I could upstairs. I did not hear anything said. I went to the ship's hospital for first aid.

Q. Do you recall whether or not you were stabbed in any other place?

A. It went in my back and three times in my arm.

Q. The first wound you remember was in the back? A. Yes.

Q. Then you say you squirmed around. Did you turn facing Yates then?

A. Only part ways, my side was toward him.

Q. Do you remember being stabbed in the arm three times?

A. No, I don't remember that, even, it all happened so quickly that I only [31] remember this stab in my back. That is all I do remember. I went immediately to the hospital and remained there about eleven days. I returned to work about March 4th, but I couldn't fulfill the duties at the present time as a boatswain or a seaman. I never had any trouble with Mr. Yates previous to this affair, never any arguments or fights. I have been on the vessel about a year and two months; Yates was on the vessel only for the last trip.

#### Cross-Examination

I remained in the hospital of the ship about ten days and upon my release returned to my duties as boatswain, but not in full capacity. As a boatswain, I have charge of the seaman; I receive my orders from the mate, which I execute with the sea-

(Testimony of Henry Frederick Olsen.)

man. I am foreman of the seaman. Yates is not a seaman and was not under my immediate supervision and I am not his boss or foreman. I have nothing to do with the mess room, which is under the charge and supervision of the chief steward, but this particular mess room comes under the jurisdiction of the third steward, Bill Collins. If I had any complaint to make concerning the mess room I was supposed to make it to Mr. Collins. I had no trouble with Mr. Yates before February 4th. I never had any words with Mr. Yates nor any difficulty prior to February 4th. I never complained to Mr. Yates about not being served extra portions of ice cream and cake during the trip, nor did I at any time get up and go and get it myself. Mr. Yates never refused to serve me a second helping. On February 4, I got into the mess room about 7:40. Mr. Yates was the only mess boy waiting on the table. I do not know where the other messboy was that morning or if he was in fact sick, but I did inquire as to where the other messboy was. There were not about fifteen others in the mess room waiting to be waited on, but about six to eight men. Yates was working at that time; [32] he was working on all of them.

Q. You were rather impudent, weren't you, wanted to be served quickly?

A. Well, I had to be at work at eight o'clock in the morning.

The mess room opens at 7:30, I had just twenty

(Testimony of Henry Frederick Olsen.)

minutes to be served and eat and get to work; I could finish my breakfast in about ten minutes. Sometimes I would get to the mess room at 7:30, sometimes later; it all varies. There were always two men at all times to wait on the table; this was the first time I found but one man. When I asked Yates where the other man was he told me it was one of my business; I told him it was, and if he didn't show up I would go and get the third steward, Bill Collins, which I did. He was standing outside of the passageway, watching the general procedure of the mess, and I told him there was only one messboy in attendance that morning. I did not tell him that Yates was disrespectful to me. Mr. Collins didn't say nothing to me, he was standing out in the passageway watching the procedure of the mess. I just went back and sat down. No one came in to help Yates. I sat down and I asked Yates, "Are you going to wait upon us this morning?". And he replied, "You can wait, you are no better than anybody else." He was working all that time waiting on people at the table; he was busy. I finally got my ham and eggs by waiting; I was served about a quarter to eight, about five minutes after I had gotten into the place. He set the ham and eggs down in a manner like this, very hard. The plate was ordinary tableware; it did not break nor did any of the food spill out of the plate.

Q. Now, did you finish eating it?

(Testimony of Henry Frederick Olsen.)

A. At that time I got up when the food was set in front of me, with the intention of hitting Yates.

Q. Just a minute, as soon as he laid the plate down in front of you did Mr. Yates say anything to you? A. No. [33]

Q. Did he hit you? A. No.

Q. Did he push you? A. No.

Q. He just merely laid the plate down in front of you and you immediately got up? A. Yes.

Q. With the intention of hitting him?

A. Yes.

Q. Did you jump up?

A. Yes, I jumped up.

Q. You jumped up at him, didn't you?

A. Yes.

Q. How far away was he when you jumped up with the intention of hitting him?

A. He was at the next table.

Q. How far away from you?

A. About ten feet away from my table.

Q. Did you make a dash for him?

A. Yes.

Q. As you made a dash for him you ran ten feet toward him, is that right?

A. He was on the way to the table when I got up from my table and went after him.

Q. He had his back to you and he walked away from you? A. Yes.

Q. As you reached him you struck him, didn't you? A. No.

(Testimony of Henry Frederick Olsen.)

Q. Are you sure of that? A. Yes.

Q. What did you do?

A. He turned around and we got into some kind of scuffle and clench in the corner of the mess room.

Q. Did you say anything when you got up and dashed toward him? A. No.

Q. How did he happen to turn around?

A. That I don't know.

Q. He just happened to turn around as you reached him? A. Yes.

Q. Then you both got into a scuffle?

A. Yes.

Q. In the scuffle didn't you strike him?

A. No.

Q. You did not hit him at all? A. No.

Q. Was he holding your arms?

A. Well, I don't remember the exact position of my arms; when we were in this scuffle we were in some kind of clench, holding onto each other; that is all I know about it.

The scuffle ended up in the passageway from the mess room; I disengaged myself from Yates. Yates did not strike me at all. Yates said to me "What is the matter with you, anyway?" I said "The only thing I ask from you is a little cooperation and service, which we haven't had since we left San Francisco. That is all that was said, and I went back to the mess room and finished my breakfast. I do not know what he did. I was wear-

(Testimony of Henry Frederick Olsen.)

ing a shirt. Yates was wearing a shirt; I did not notice his shirt torn nor did I notice him bleeding anywhere. I finished breakfast a little before eight o'clock and went out of the mess room and engaged Mr. Collins in conversation. This conversation was not about the this situation, but about the general running of the mess room; I was making a general complaint about the mess. I was standing talking to Bill Collins at the entrance of the mess room, with my back to the mess room, facing away from it in the general direction of the stairs that led down into the frigid air box. Collins was standing on my right side. Yates forecastle was in the general direction on my right. I don't know how Yates approached me; I did not see him approach me.

Q. When did you feel the first stab?

A. In my back.

Q. In your back. A. Yes.

Q. Where in your back?

A. On the right side of my back.

Q. You never got any wound in the back, did you? A. Yes, right here.

Q. It was on your chest wall, wasn't it? (Objection)

Q. You had a wound in your side but not on the back?

A. It was right here, wherever that is on my right side.

Q. Is that the first wound you felt?

A. Yes, as far as I can remember.

(Testimony of Henry Frederick Olsen.)

Q. Then you felt the wounds in the arm?

A. Yes.

Q. Did they all come right after each other, or was there any time between each one?

A. They came so fast that I don't remember what [35] happened, I only know I was stabbed and I ran.

Q. You did not hear anything? A. No.

Q. You did not hear Yates' voice? A. No.

Q. Which direction did you run?

A. I ran up the passageway on deck.

Q. Did you run in this direction, or that direction? A. I went in that direction.

Q. You ran in this direction or the direction from which Yates came, is that right?

A. Yes.

Q. Toward this passageway—where did that lead to?

A. That leads up to the forward deck.

Q. You could have gone in that direction, if you wanted to, couldn't you? A. No.

Q. Nothing to impede your progress in that direction? A. No.

Q. Did you raise your arm at all?

A. I don't remember.

Q. At any time?

A. I don't remember that.

Q. You don't remember raising your arms as Yates approached you?

A. No, I didn't know that Yates was approaching me at all before I felt that I was stabbed.

(Testimony of Henry Frederick Olsen.)

Q. At any time before you were stabbed did you raise your arm? A. No.

Q. Your right arm? A. No.

Q. Are you sure of that? A. Yes.

I ran down the passage way as fast as I could, and said as I ran "I am stabbed", or words to that effect. Yates did not follow me, I don't know what he did, he did not follow me. I ran about thirty feet to where there was a stairway leading up on deck, to the ship's hospital; I fell down at the foot of the stairs, due to my speed; then I got up and went to the hospital. I saw Yates occasionally thereafter on the homeward voyage, the first time about three weeks later, but we did not speak to each other. He was not working, he was in confinement in the brig. [36]

#### Redirect Examination

Their forecastle is on the left side of the passageway downward. The general direction of the stewards' quarters, that is on the left side as you enter that passageway. It is about 150 feet away from the mess room.

---

WILLIAM A. COLLINS,

called for the United States.

I am employed as third steward on the "President Johnson" and was so employed on February 4th of this year. I first saw Olsen on that morning when he came to me and told me that the serv-

(Testimony of William A. Collins.)

ice in the mess room was rather slow, and I told him to go back and sit down and I would see he got his breakfast. At this time I was in the passageway between the mess room and the galley. Olsen went back to the mess room. Yates was then in the mess room. I next saw Olsen and Yates when they came out of the mess room together, scuffling; they were locked together, wrestling. I saw no blows struck by either party. They broke up voluntarily. The only thing I heard them say at that time is, Yates said to Olsen "What is the matter with you?", and Olsen said "What is the matter with you?" They both broke up right after that. Olsen went back into the mess room and sat down to eat his breakfast, and Yates went back to work in the mess room. I observed Yates at that time and I did not see any cuts or bleeding on him. Yates was wearing an upper, and I noticed after they had broken away that it was torn. The next time that I saw Olsen was after he finished breakfast; about five minutes elapsed from the time I saw them break up and Olsen came out. Mr. Olsen came out of the mess room and came over to me and started to talk to me; his left side was toward the mess room door; we were facing each other.

Q. What was the next thing that took place after that while you were standing there talking?

A. Yates came out of the mess room with a knife and stabbed Olsen with it. [37]

(Testimony of William A. Collins.)

Q. You say Yates came out of the mess room?

A. Yes.

Q. So that at this time, to the best of your recollection, you were facing up in this direction and Olsen facing toward you? A. Yes.

Q. With his left side toward the door?

A. Yes.

Q. And Yates came out of the door?

A. That is right.

Q. Did you see or hear Yates say anything as he came out of the door?

A. He said something about, "I will kill you, you son-of-a-bitch," or words to that effect. I didn't pay much attention to it.

Q. To the best of your recollection that is what he said? A. That is right.

Q. Do you know whether or not at that time he had a knife in his hand? A. Yes, he had.

Q. Did you see the knife? A. Yes.

Q. Will you describe it for us?

A. I did not see it very plainly, but it looked like one of these knives they carry around the ships; nearly all of the crew and everybody carries them. It looked like it was about eight or nine inches in length, or something like that; I didn't measure it. I just saw it at a glance.

Q. Do you recall what the color of the blade was? A. No, I do not.

Q. Do you know whether it was the type of knife that is sharpened on both sides?

A. Yes, it was.

(Testimony of William A. Collins.)

Q. Do you know whether it was pointed or not? A. Yes, it was.

Q. In other words, it was a sort of a sheath type, double-edged blade, about nine inches long?

A. Yes.

Q. You are in charge of the mess room, are you not? A. Yes.

Q. You are familiar with the type of knives that they have in there to clean crumbs off the table?

A. Yes. [38]

Q. Did the mess men, in their occupation, use a similar knife to this?

A. No; they used ordinary table knives.

Q. Ordinary table knives; I presume sharp only on the one side? A. Yes.

Q. Not pointed?

A. No, they are not pointed.

Q. Do you know, in your capacity as third steward, whether there is any use for this type of knife in Yates' possession in connection with his duty as a mess man?

A. No, there is not.

Q. Now, at that time, you saw Yates come out of the mess room, and then you saw him stab Olsen?

A. He must have stabbed him. Olsen left right after that, and there was blood dropping on the deck.

Q. Do you know about how much time elapsed during this?

A. It was instantaneous; about five seconds.

(Testimony of William A. Collins.)

Q. Did you or did you not see Olsen throw up his arms at any time?

A. I don't remember; I could not say.

Q. The next thing you know Olsen turned and ran, in what direction?

A. He ran what they call on the ship aft, toward his quarters.

Q. That would be down in this direction?

A. Yes; down.

Q. Down this way? A. Yes.

Q. Did you have any conversation with Yates after Olsen ran away? A. None whatsoever.

Q. You did not say anything to him?

A. No.

Q. Did you see what he did after that?

A. Yes; he went back in the mess room and went to work.

#### Cross-Examination

I did not see the quarreling in the mess room, only outside in the passageway, when they came out holding on to each other. I saw them disengage themselves, and saw Yates and Olsen go back in the mess room. Still later, Olsen came out and talked to me in the passageway, right by the stairway leading down into the refrigerator box. I was facing, and looking away [39] from the mess room; my back would be to the passageway. The entrance to the mess room was nearly directly opposite the place where I was standing. He would have his right side toward the mess room. I am not sure

(Testimony of William A. Collins.)

that Yates came out of the mess room; as far as I remember he did; but I am in doubt, he could have come up from the forecastle; I could be mistaken.

Q. But at any rate you saw Yates about the entrance to the mess room, isn't that right?

A. That is right.

Q. And at that moment did you see Olsen raise his arm or hand? A. I don't remember.

Q. Could he have done it and you not notice it?

A. He could have, yes.

Q. Then you saw Olsen run in this direction down the passageway, is that right?

A. That is right.

O. In doing that he went in the general direction of Yates, didn't he? In other words, toward Yates, rather than away from him?

A. No; he went away from Yates then.

Q. Away from him? A. Yes.

Q. At the time he started to run was Yates at his side?

A. Well, he was right around there, because as soon as the thing happened he went back into the mess room.

Q. It all happened in less than a minute; this all happened in just seconds? A. Yes.

Q. You and Olsen were standing facing each other, talking there? A. Yes.

Q. Yates was off on your side, is that right?

A. That is right.

Q. Coming from your side? A. Yes.

(Testimony of William A. Collins.)

Q. Approaching you? A. Yes.

Q. At that moment Olsen started down this way? A. That is right.

Q. And at the same moment you saw a knife in his hand, is that right? A. Yes.

Q. Did you see Yates stab Olsen.

A. Yes, he made a pass at him.

Q. What is that?

A. He made a dash at him. [40]

Q. Wasn't Olsen running in his direction, past him at that moment?

A. No; when Olsen started to run he ran past me, between me and Yates.

Q. He went between you and Yates?

A. Yes.

Q. Right on down the passageway?

A. Yes.

Q. What did Yates do, stand right there?

A. No; he went back in the mess room and went back to work.

Q. He did not follow him? A. No.

Q. He did not run after him? A. No.

Q. He just went right back into the mess room?

A. That is right.

Q. You did not get a very good look at that knife?

A. No, I did not get a very good look; I just got a glance at it. It looked like a knife that I have described.

(Testimony of William A. Collins.)

Q. But you just got a glance of it?

A. Yes.

Q. Did he take the knife back into the mess room? A. As far as I know.

#### Redirect Examination

My left side was toward the mess room: Olsen was facing me, with his right side toward the mess room. The first glimpse I had of Yates was when he was opposite the mess room, and as far as I know, I think he came out of the mess room with a knife in his hand. At the time Olsen was stabbed he was standing still. It was not until after he was stabbed that he started to run. At that time he ran past me and Yates was somewhere here at my side.

---

ROLAND PICARD,

called for the United States.

I am a junior engineer on the "President Johnson" and was so occupied on February 4 of this year. I know both Yates and Olsen. Between 7 and 8 o'clock on February 4 I saw Olsen and Yates together, standing by the P. O. mess hall. I was standing [41] on the ladder going down to the butcher shop at the time. The only thing I saw was when Mr. Olsen put up his hand and hollered, "No, you don't", and started running, and I happened to turn around, and I seen Mr. Yates over

(Testimony of Roland Picard.)

there put a knife into a sheath. Mr. Collins was there at that time. The first thing I heard was Mr. Olsen go up to Collins and say to Collins, "It's getting so a person has to fight for his meals". Yates was not there at that time; I first saw Yates when I heard Mr. Olsen holler, "No you don't". I was standing sideways; I was not facing them at all. I could just see the heads of Olsen and Yates at the time. The next thing I saw was Olsen running, and then I saw him put his knife in a sheath; I saw Mr. Yates put a knife in a sheath. I did not get a good look at it, to tell you the truth, I don't know whether it was a leather sheath; then I saw Olsen running off, I did not see where Yates went after that. Then two bells rang, and I had to go below on my watch.

#### Cross-Examination

I did not see the scuffle in the mess room. The first I saw was Olsen talking to Collins in the passageway and saying, "It is getting so a fellow has to fight for his meals now". I was standing on the ladder leading to the butcher shop, Olsen was facing the same way I was. I was facing toward the after end of the ship. I was not facing toward the mess room. I heard Olsen say "No, you don't", and about that time Mr. Olsen raised his right arm. And then I saw Mr. Olsen run in this direction, and Yates was alongside of him. I did not see Yates stab him with a knife. All I saw was his arms go up and saw him run down the passage-

(Testimony of Roland Picard.)

way. Yates stood right there and did not chase or run after him.

#### Redirect Examination

The first thing I heard was Olsen say "No, you don't". He turned toward Olsen with his arms up. I don't know at all [42] whether or not he had been stabbed before that. I did not see Yates stab him after I turned. Immediately after I saw him with his arm up he immediately started to run down the passageway.

---

JOHN EDWARD YATES,

the defendant, called in his own behalf:

I am thirty years old, married, and my wife has a little girl.

Q. By the way, have you ever been convicted of a felony before?

A. Twelve years before.

Q. What was the charge?

A. It was highway robbery.

Q. Highway robbery? A. Yes.

Q. Were you made an accomplice of some kind?

A. Yes.

Q. That was 12 years ago? A. Yes.

Q. Where? A. Minneapolis, Minnesota.

Q. Have you been in any trouble since that time? A. No.

Q. Just that one time? A. Yes.

(Testimony of John Edward Yates.)

Q. Have you worked constantly and steadily since that time, in the last 12 years? A. Yes.

Q. How long have you been married?

A. A little over three years.

I have been sailing on this coast two years this June. This is my first trip on this army transport. But, I have made numerous trips to the War Zone on other army transports. I have served in the capacity of a mess man. I did not know Mr. Olsen prior to this trip. The only difficulty I had with Mr. Olsen prior to February 4th was that he would get up and help himself to pie and ice cream when he was only supposed to have one piece, and somebody else had to go without, and I had his room to make up, and he would come to me and say, "I want to have my bed made so-and-so," and little things like that, but I just ignored them. I had to make his bed too. There was only enough ice cream and cake to serve everybody once. In other words, to give one piece [43] to a person. Olsen would take more than one portion, he would get up and help himself. This fight took place on February 4th, when I was working alone in the mess room. Ordinarily, there are two of us. The other man was sick and I had to do all the work until after breakfast was started, and then the steward sent me another fellow. In the interim I set the table and got ready for breakfast. I had on a pair of brown pants and shoes and a top shirt. I think Olsen had on a shirt or jacket. I think it was a jacket he had on. I know he had a

(Testimony of John Edward Yates.)

jacket on, because they are not allowed to go to the mess room without a jacket on. I did not see Olsen come into the mess room that morning, but saw him sitting at the second table. He asked me where the other mess man was. I told him I didn't know. "What do you want to eat?" And he said, "Are you going to get the other mess man, or am I going to get the third steward?" And I said, "I am not going to get the other mess man; go and get the third steward." So he went and got the third steward and came back, and the third steward told him there was another man helping me, and the boatswain went over and sat down. Another man at the table had asked me for ham and eggs, and when I got through there I went back and got ham and eggs for Olsen. I got them as quickly as I could and gave as quick service as I possibly could. I did not lay the ham and eggs down a little heavy—no more than usual; there is nothing fancy about it—just slide the plate along. I did not take time to lay them down nice and quiet, but just passed them along. There are 36 to 40 men to feed, and as you stand at the steam table a person will tell you what he wants to eat; you order it up and take it over to him and you go back to the steam table and get what the next one wants. There is nothing fancy about it, and sometimes they reach across and get the plate themselves from the steam table. Sometimes, I slide [44] the plates along the table. It all depends on where they sit. If they sit in the corner, you probably stand on the side and slide

(Testimony of John Edward Yates.)

the plate in. I sat Olsen's plate down a little hard. He said nothing. I had to wait on these people fast this morning; just as quick as you can dish it out and get it over. They have an hour to eat. After I laid the ham and eggs down, I hadn't got five feet from the table when he was up and after me. I turned around and he swung and hit me on the side of the jaw. Right over here. At that time I grabbed his arm, and he was tussling with me and pushing me out of the mess room, and I had my hand over him, like that, and he reached up and pulled my arm down, and when he did that I said, "What is the matter with you?" And he turned me loose and mumbled something, and he went back and sat down, and I went back to work. I asked him what was the matter and he mummbled something; I don't know what he said. I did not strike him. I was trying to keep him from striking me. I was holding his arm. After I pulled away, he went back and sat down and I went back to work. I went in the mess room and started to work, and my undershirt was torn off, and I was bleeding right across here. By that time, the other man came to help me, and I gave him the keys to my locker, and I asked him to get a white coat out of the locker, and he started to wait on somebody else, and instead of waiting for him, I went back to the locker myself. As I went by the other man I told him I was going back and change my shirt and clean myself up, and I came back to the hallway—the door leading into the mess room. This pass-

(Testimony of John Edward Yates.)

ageway goes to the crew's quarters where my fore-castle is, where I went to change my clothes, that forecastle is my living quarters and I changed my shirt. I came back toward the mess room up this passageway toward the entrance of the mess room. When I got up here, I saw the boatswain and the third steward standing by the stairway talking. I overheard the [45] conversation and they were talking about the incident and what happened. I walked up to the boatswain, toward both of them. My purpose was to see that he was telling the story about the incident and I wanted to hear whether he was getting the story straight, or telling the truth, or what. I wanted to offer my explanation. When I walked up, he raised his hand at me.

Q. The other man said it ought to be going up and down this way. How far away from the entrance to the mess room door were you standing?

A. No more than about five feet.

Q. You had to go past them in order to go into the mess room?

A. No, they were both facing that way.

Q. You stepped right up to the doorway to the mess room? A. Yes.

Q. What happened?

A. When I stepped up there the boatswain raised his hand at me.

Q. Did you have a knife in your hand?

A. Yes.

Q. What kind of a knife?

(Testimony of John Edward Yates.)

A. Just a plain knife out of the mess room.

Q. What were you doing with it at that time?

A. Well, at the time I went back to my forecastle I was going to clean the plates and put them on the table; there is not room for all of them to sit at one time. So when they get through we have to clean plates and set them over. And instead of cleaning plates I went back to the forecastle.

Q. Did you realize that you were taking the knife back with you? A. No.

Q. Did you know that you had the knife in your hand when you went back to the forecastle?

A. Well, no, I did not; no.

Q. Were you excited? A. Yes.

Q. Now, when you got back to the forecastle to change your clothes did you see the knife in your hand—did you remember [46] the knife?

A. Yes, I think I did remember.

Q. Did you take the knife back when you went back toward the mess room? A. Yes.

Q. You were on your way to the mess room?

A. Yes.

Q. What for? A. To go back to work.

Q. To finish up your work? A. Yes.

Q. You say you used that knife in your work?

A. Yes.

Q. To do what?

A. Well, I was supposed to carry that to clean plates.

Q. An ordinary table knife? A. Yes.

(Testimony of John Edward Yates.)

Q. Now, when Mr. Olsen raised his right hand what did you say, what did he say?

A. When he raised his right hand I raised my hand, and when I raised my hand he seen the knife and he started this way, and I jabbed at him like that.

Q. What did you think he was doing when he raised his right hand?

A. I didn't know what he was doing.

Mr. Davis: I object to what he thought.

Mr. Abrams: I think we are entitled to show his frame of mind. That is proper in this case.

The Court: Proceed.

Mr. Abrams: Q. What did you think when he raised his hand?

A. I thought he was going to hit me.

Q. You thought he was going to strike you?

A. Yes.

Q. Go ahead.

A. When I raised my hand he seen my knife, and he came toward me.

Q. He came toward you with his arm up?

A. No, he did not have his arm up when he came toward me.

Q. Then you stabbed at him with the knife?

A. Yes, stabbed at him with the knife.

Q. Did you jab hard? A. No.

Q. When you jabbed him with it did you intend to kill him? [47]

A. I had no intention of even jabbing him with the knife; I was all nervous and excited, and I had no intention on my part whatsoever of doing that.

(Testimony of John Edward Yates.)

Q. Do you remember jabbing him two or three times in the arm?

A. No, I only jabbed at him once.

Q. Did you run after him, or chase him?

A. No.

Q. Do you remember saying, "I'll kill you, you son-of-a-bitch"? Do you remember saying that?

A. I don't remember. I might have said something like that, I don't know; I don't remember.

Q. All you were trying to do was to protect yourself, is that it? A. Yes.

I did not have a sheath or scabbard on my person to hold this knife. I had one of these double edged hunting knives at one time, but did not have one on this trip. Everybody in the crew carries one. They are used for shark or cutting bait, or cutting life rafts loose from the boat in case you have any difficulty. I sold mine last trip to a soldier in the Hebrides Group. The type of ordinary table knife I had in my hand, I would say the handle and blade, were maybe six inches long. Some of them are sharp and some are not. After this happened, I was placed in the brig for the rest of the trip of twenty-eight days coming back and was placed under arrest when I arrived in port. I did not see Olsen the rest of the trip except that I saw him the last week when we were coming in. They took me out on the deck for air an hour every day, and I seen him at work, but did not talk to him.

(Testimony of John Edward Yates.)

Cross Examination

I was arrested in 1932 for highway robbery.

Q. Then you said that you had never been in any other trouble, is that right?

A. I had not.

Q. Isn't it a fact that you were picked up in 1938 for assault [48] and found not guilty?

A. No.

Q. That is not true?

A. I was picked up for investigation with a lot of other people, but that was all there was to it; there was no assault, they had no charge against me on it.

Q. But you were arrested in 1938?

A. No; as a witness. I was picked up with a bunch of other people.

Q. You say there was no charge placed against you? A. No.

Mr. Abrams: I do not think it is fair to ask him as to that. I asked him if he had a felony conviction.

Mr. Davis: Mr. Abrams put this man's character in evidence. I asked him if he had been convicted of a felony, and then if he had ever been in any trouble, and he answered no.

The Court: Proceed.

Mr. Davis: I am inquiring if he was not in any other trouble. That is not under the felony rule at all.

When the boatswain asked me where the other mess man was, I did not say it was none of his

(Testimony of John Edward Yates.)

God-damned business, I didn't say nothing like that. I didn't have any such altercation with him at all. When I brought the ham and eggs to him, I actually did not slam them down in front of him, aside from my custom of sliding anything on that table. I did put them down hard, that is what he got mad about. I didn't get five feet away from the table and at that time he shoved his chair back and came at me and hit me. No one separated us out in the hallway, he turned me loose and I went about my work and he went back to his breakfast. It was about five minutes after this that the incident we are concerned with took place. I don't know if he finished his breakfast, I left him in the mess room. As far as I was concerned, the first wrestling match, or fight, or whatever it was, was over. My shirt was torn and I went to the forecastle to change it and I took from the mess room to the forecastle this ordinary [49] table knife. It was not a long, blue bladed, double pointed knife that is carried in a scabbard. It was just a plain knife to eat with. I did not go down to the forecastle on purpose to get that knife. I did not throw it out of the porthole thereafter. When I came back into the mess room, I threw the knife into the dirty silverware bucket on the floor. When I came back from the forecastle, Olsen and Collins were standing together. They were not annoying me in any way nor did they address me. I had to pass right next to them. When you walk down the hall you do not get over to the right or left, you walk

(Testimony of John Edward Yates.)

in the middle. I did not rub up against them. I could walk right by them like I walk by anyone else in the hall. Olsen was standing facing the stairway going down to the butcher shop. His back was not toward me, nor was his side toward me. He was right face to face with me. As I came up there, I don't remember saying, "I'll kill you, you son-of-a-bitch". I saw him waving his hands and talking, and I knew he was talking about the incident and telling the steward. I walked over for the purpose of explaining my side of the case and to see if he was telling anything that was not true. I don't remember saying, "I'll kill you, you son-of-a-bitch". I wouldn't say I did not say it. I don't remember saying it. When I went down to change my shirt, I didn't testify I didn't remember whether or not I had the knife with me at that time; I probably had not paid any attention to it. I had it with me. The mess hall to the forecastle is about a half a block on the same level. I walked over to where Olsen and Collins were talking. He raised his arm, and when he raised his arm, I raised my arm, and he seen the knife, and when he seen the knife in my hand, he started toward me and I jabbed.

Q. You mean you only stabbed him once?

A. I only jabbed him once. [50]

Q. Do you remember what part of the body?

A. I don't know just where it was.

Q. Isn't it a fact that you stabbed him in the

(Testimony of John Edward Yates.)

side, in the back here, and that you stabbed him three times in the arm?

A. I don't know whether I stabbed him in the arm or in the side.

Q. But you say you made only just one jab, is that right? A. Yes.

Q. Did you do it very hard?

A. No; just arm's length, like that.

Q. Would you say that you stabbed him, or would you say that he walked into your knife?

A. Well, he was coming this way; I didn't know what he was going to do. He practically walked into it.

Q. What I want to know is, are you trying to give me the impression that you merely threw up your arm in order to protect yourself, and the knife happened to be there and he just walked into it?

A. I didn't say that.

Q. You did definitely stab him with the knife at least once?

A. I jabbed at him with the knife, yes.

Q. And at that time he had merely thrown his arm up. Did you see any knife or weapon in his hand? A. No.

Q. He started to run, and he kept on running after you stabbed him, didn't he? A. Yes.

The knife was an ordinary table knife. Some are sharp and some are dull. I did not notice this knife. None of them are steel plated, they are silver plated. I was in the brig all the way back.

(Testimony of John Edward Yates.)

The brig is on the first deck down from the main deck. When we left Purvis Bay, I was in the brig, and when the soldiers got off, they had no one to take care of me, so they put me up next to the hospital. I was in the room there and I guess they needed the room, so they took me and put me in one of the state- [51] rooms and put a lock on the door. It was called the brig. There was a bed in the room and I was fed the same meals as everybody else on the ship. When I came back from the forecastle, I had no knife other than an ordinary table knife. I just walked up from changing my shirt and as far as I was concerned, the whole thing was over. I saw these two men standing there talking and went up to explain my side of the matter. As I got close to Olsen, he raised his arm and I raised mine. I raised it like that. The knife was in my hand like that. He started toward me and as he started toward me, I jabbed him, and he turned around and kept on going. I only struck him once and as far as I know, it was only one jab.

---

JOHN R. DE LORA,

called for the Defendant.

I was employed as a porter when this altercation took place between Yates and Olsen in February. I know both Yates and Olsen. I did not see what took place between the two men in the

(Testimony of John R. De Lora.)

mess room, I only seen the part where Mr. Yates stabbed Olsen. I was in the pantry; at the time I was cutting some grapefruit, and I heard the commotion out there, but I didn't see the beginning of the fight, and then I saw Mr. Yates going down towards the forecastle, and he was bleeding, and he had his shirt all torn, and I called back to him, but he kept going, and I didn't have any chance to speak to him, I stayed there, and when I was almost finished there Mr. Yates was coming back, and he had a clean shirt on, and I seen him pass right next to me, and I seen him with a knife. A saw he had a common table knife in his hands. He was walking toward the mess room, and as he got near Mr. Olsen and Collins I seen Mr. Olsen dash toward Mr. Yates, and I seen Mr. Yates put up his hand like to strike a blow. I saw Olsen's hands up. Olsen was the one that was going toward [52] him, and then Mr. Olsen jumped back when he seen the knife, and then came toward him again, and that is when I seen Yates jab him with the knife, and then Mr. Olsen run down the alley toward the forecastle. Mr. Yates went in the mess room. That is all that happened; that is all I seen.

#### Cross Examination

I was standing there when Yates came back. I saw Mr. Olsen start to rush toward Yates. They were about two or three feet apart. Yates was still walking toward Olsen, toward the mess room. To get to the mess room, he had to go by Mr. Olsen. From the direction I saw Yates, I would say he

(Testimony of John R. De Lora.)

was going to go by and go to work. He came at Yates with his hands up, like he was going to punch him. His hand was up; it was like he was rushing out to grab him. I don't remember whether he had both hands up. I remember he had one hand up—he rushed forward with his hand up. I couldn't say whether he had both hands up. It was both hands. My best recollection is he rushed out with both hands, not with one hand—he had them as if he was going to grab Mr. Yates. Only one of Mr. Yates' hands came up, I think. That is the hand that had the knife. Yates' hands were like you would go to block a blow. The knife was sticking down. He threw his hand up, because I could see the whole knife. I am sure the blade was sticking out this way, and not pointed the other way. I seen Yates jab at Olsen with the knife. Mr. Yates jabbed at Mr. Olsen with the knife like this. When Mr. Olsen was going toward him I seen Mr. Yates jab him. The first thing I saw was Olsen coming out after Yates with both hands up and then Yates threw his hands up like he was going to ward off a blow, with the knife this way. Then Mr. Olsen must have jumped back. His hand down his side. Then Olsen started toward him again. He was coming right toward him. He could not very well [53] around him, because one man can block the passageway there very easy. I don't believe the passageway is five feet wide; I believe it is about two feet wide; where this took place, it is larger

(Testimony of John R. De Lora.)

there. I will say he stabbed Mr. Olsen as he was going toward him—as Olsen comes directly toward him, he reaches out and stabs him. I did not see where the blow landed. I did not see Mr. Yates' hand move back and forth more than once. I would say it was a very light blow. I just seen that once. I don't know where he stabbed him. Then Mr. Olsen jumped back and rushed right past him, down the alley toward the forecastle. [54]

The Court (Orally): Ladies and Gentlemen of the Jury, if I may now have your attention I will instruct you as to the law of the case in the light of which you will determine what your verdict will be.

It is my duty to instruct you on the law of this case; and it is your duty as jurors to follow the law as given to you in these instructions and to apply the law thus given to you to the facts in evidence before you.

It is the duty of the jury to give uniform consideration to all of the instructions herein given, to consider the whole and every part thereof, and to accept such instructions as a correct statement of the law involved.

On the other hand, I charge you that it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose. You are the sole judges of the weight, effect and value of the evidence, and of the credibility of the witnesses.

In this case the defendant, John Edward Yates, is charged with the crime of assault with intent to commit murder. The indictment alleges that the crime occurred on or about the 4th day of February, 1944, on an American vessel called the SS President Johnson, belonging to the American Lines, Inc., a Delaware corporation, at the time the vessel was on waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state of the United States, at Purvis Bay, Florida Island, Solomon Island Group.

The indictment further charges that at the time and place mentioned, the defendant, unlawfully, feloniously, wilfully, and with malice aforethought, by means of a deadly weapon, to-wit, a knife or sharp instrument, made an assault upon the person of Henry Frederick Olsen, stabbing and wounding the said Henry [55] Frederick Olsen with the intent then and there wilfully, unlawfully, feloniously, and with malice aforethought to kill and murder said Henry Frederick Olsen.

It is further alleged that after the stabbing the defendant was brought to San Francisco, this being the District to which the defendant was first brought after the stabbing.

The fact that an indictment has been filed against the defendant is not to be considered by you as any evidence of the defendant's guilt. The indictment is merely a legal accusation charging a defendant with the commission of a crime; it is not,

(Testimony of John R. De Lora.)

however, evidence against any such defendant, and does not create any presumption or inference of the defendant's guilt, and you are not to consider such fact in arriving at your verdict.

The defendant is presumed to be innocent of the crime charged against him. This presumption of innocence attaches at the beginning of the trial. It has the weight and effect of evidence in the defendant's behalf, and continues to operate in the defendant's favor throughout all the stages of the trial. When you finally retire to the jury room to deliberate upon a verdict, it becomes your duty to consider the evidence introduced in this case in the light of this presumption. This presumption is sufficient to acquit any defendant charged with a crime unless it is overcome by evidence that satisfies your mind to a moral certainty and beyond a reasonable doubt of the guilt of the accused, and unless you, and each of you, are so satisfied, it is your duty to find the defendant not guilty.

It is not necessary for the defendant to prove his innocence; the burden rests upon the prosecution to establish every element of the crime with which a defendant is charged to a moral certainty and beyond a reasonable doubt. [56]

A reasonable doubt is a doubt resting upon the judgment and reason of him or her who conscientiously entertains it from the evidence in the case. It is a doubt based upon reason. By such a doubt is not meant every possible or fanciful conjecture

that may be suggested or imagined, but a fair doubt based on reason and common sense, and growing out of the testimony in the case. A reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence in the case, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions that are given to you.

The law under which the defendant John Edward Yates is charged in this indictment in an Act of Congress known as Title 18 United States Code Annotated, Section 455, which provides in part as follows:

"Whoever shall assault another with intent to commit murder" shall be punished according as the law provides.

An assault is an assault with an intent to commit murder when it is committed with a deadly weapon and with intent to kill the person assaulted, done unlawfully and intentionally and with malice aforethought, and under such circumstances that, had death resulted therefrom to the person assaulted, the killing would have been murder.

Murder is the unlawful killing of one human being by another, with malice aforethought.

Malice may be defined as an intent to do injury to another [57] *Malice may be defined as an intent to do injury to another.* Malice in law does not necessarily mean hate or ill-will, but consists in any unlawful act wilfully done without legal excuse therefor.

Malice is otherwise defined as the doing of a wrongful act without just cause or excuse in such a way and under such circumstances as to show that it is done wrongfully and in the absence of that which would give the party the right to defend against it; or that it was done in the absence of mitigating circumstances. It is otherwise defined as the doing of a wrongful act without just cause or excuse, and in such a way as to show that he who does it has a heart void of social duty and a mind fatally bent upon mischief. Anything that shows deliberation, anything that shows a premeditated purpose to do a wicked or wilful act that might result in death, is evidence that may be considered by the jury as evidence of malice and of the existence of malice aforethought.

A deadly weapon is any weapon which is likely to produce death or do great bodily harm. The fact that a deadly weapon has been used may be a circumstance from which together with all the other facts and circumstances in the case the jury may infer malice.

An assault is an unlawful attempt, coupled with a present ability to commit a violent injury upon the person of another.

Implied malice means that which may be inferred from acts and facts shown. Thus, when a wanton, wicked, cruel or revengeful act is shown, the inference or implication may be drawn that the person who did such an act was actuated by malice.

When one person assaults another with a deadly weapon, that is a weapon that will likely produce death, the law presumes [58] malice from that fact alone, in the absence of proof, either direct or implied, to the contrary. The selection and use of a weapon likely to produce death in a deadly manner, without legal cause, raises a presumption and is evidence of malice.

You are instructed that you may take into consideration whether it is true that the defendant made any declaration or statement at the time or immediately before the assault as to what his intentions were, and also his testimony regarding his intentions at the time of the assault, if any. However, verbal statements or admissions should be received by you with caution, as they are subject to imperfection and mistake, owing to the person speaking not having possibly clearly expressed his meaning, or the person spoken to not having possibly clearly understood the speaker. But when such verbal statements are precisely given, and identified by intelligent and reliable witnesses, they are entitled to weight and credit.

Where one without fault is placed under circumstances sufficient to excite the fears of a reasonable

person that another designs to commit a felony or some great bodily injury upon him and to afford grounds for reasonable belief that there is imminent danger of the accomplishment of this design, he may, acting under these fears alone, attack and even slay his assailant and be justified by the appearances.

A person may repel, force by force, in defense of person, property, habitation or life, against one who manifestly intends or endeavors, by violence or surprise to commit a known misdemeanor or felony, or either, or to do great bodily injury to his person, and the danger which would justify the defendant in the act charged against him may be either real or apparent, and the jury are not to consider the defendant was in actual peril of his [59] life or property, but only whether the indications were such as to induce a reasonable person to believe that he was in such peril of person, property, habitation or life. And if he so believed reasonably and had sufficient cause so to believe, and committed the act complained of under such belief, even though it would appear that the other person was not armed, you must acquit the defendant.

The court instructs the jury that the acts which a defendant may do and justify under a plea of self defense depend primarily upon his own conduct, and secondarily, upon the conduct of the party assailed. There is no fixed rule applicable to every case, though certain general principles, well estab-

lished, stand forth as guides for the action of men and measures for the jury's determination of their deportment.

The court instructs the jury that the mere apprehension of danger is insufficient to justify an attack. The fear must have been produced by circumstances such as would be sufficient to excite the fears of a reasonable person. The law of self defense is founded upon necessity, and in order to justify the assault of another upon this ground, it must not only appear that the defendant had reason to believe, and did believe, that he was in danger of his life, or of receiving great bodily harm, but it must also appear to the defendant's comprehension, as a reasonable person, that to avoid such danger it was absolutely necessary for him to use a deadly weapon at his assailant, if you find that the defendant was assailed.

In every crime there must exist a union or joint operation of act and intent, and for a conviction both elements must be proven to a moral certainty and beyond a reasonable doubt. Such intent is merely the purpose or willingness to commit such act. [60] It does not require a knowledge that such act is a violation of law.

The jury are the sole judges of the credibility of the witnesses and the weight to which their testimony is entitled. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which the witness testified, by the character of such testimony, or by con-

tradictory evidence. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or to the defendant, the manner in which the witness might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

If you find that the presumption of truthfulness attaching to the testimony of any witness has been repelled, then you will give the testimony of such witness such credibility, if any, as you may think it entitled to.

A witness may be impeached by the party against whom he was called, by contradictory evidence; by evidence that he has made at other times statements inconsistent with his present testimony; or by evidence that he has been convicted of a felony.

If you believe that any witness has been impeached, then you will give the testimony of such witness such credibility, if any, as you may think it entitled to.

If you believe that any witness has been impeached, then you will give the testimony of such witness such credibility, if any, as you may think it entitled to.

If a witness is shown knowingly to have testified falsely [61] on the trial touching any material

matter, the jury have a right to distrust such witness' testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony, except insofar as he has been corroborated by other credible evidence or by facts and circumstances proved on the trial.

In all criminal cases the defendant may be found guilty of any offense necessarily included in the offense charged in the indictment. Title 18 USC Section 455 also includes the following:

"Whoever with intent to do bodily harm and without just cause or excuse, shall assault another with a dangerous weapon, instrument or other thing", shall be punished as the law provides. Thus a defendant charged with an assault with intent to commit murder, as is the defendant here, may be found guilty of assault with a dangerous weapon.

If you are satisfied from the evidence beyond a reasonable doubt that the defendant, at the time and place alleged in the indictment, with a deadly weapon, reasonably calculated and likely to produce death or serious deadly injury from the manner in which it was used, and with malice aforethought, assaulted Henry Frederick Olsen with intent then and there to kill him, you may find the defendant guilty of an assault with intent to murder.

If after a careful consideration of all the testimony in the case you are satisfied beyond a reasonable doubt that the defendant committed the assault alleged, but you are not satisfied that it was

his intention to kill Henry Frederick Olsen, you may find the defendant guilty of an assault with a deadly weapon.

The court cautions you to distinguish carefully between the facts testified to by the attorneys in their arguments or [62] presentations as to what facts have been or are to be proved. And if there is a variance between the two, you must, in arriving at your verdict—to the extent that there is such variance—consider only the facts testified to by the witnesses; and you are to remember that statements of counsel in their arguments or presentations are not evidence in the case. If counsel upon either side have made any statements in your presence concerning the facts of the case, you must be careful not to regard such statements as evidence, and must look entirely to the proof in ascertaining what the facts are.

On the other hand, however, if counsel have stipulated or agreed to certain facts, you are to regard the facts so stipulated and agreed to by counsel as being conclusively proven.

In determining what your verdict shall be, you are to consider only the evidence before you. Therefore, any testimony as to which an objection was sustained by the court, and any testimony which was ordered stricken out by me, must be wholly left out of account and disregarded.

It is your duty as jurors, as I have stated, to try this case as to the facts, upon the evidence introduced at the trial, and upon the law as given you by the court in these instructions. The court, how-

ever, has not attempted to embody all the law applicable to the case in any one of these instructions, but in considering any one instruction, you must construe it in the light of and in harmony with every other instruction given, and so considering and so construing, apply the principles in it enunciated to all the evidence admitted upon the trial.

The indictment contains one count. Your verdict must be unanimous.

When you retire to your jury room to deliberate, you will [63] select one of your number as foreman or forewoman. He or she will represent you as your spokesman in the further conduct of this case in this court. The clerk will hand you forms of verdict.

After you have reached your verdict your foreman will sign the particular form of verdict which accords with the determination reached by you in this case, and you will then return into court with the same.

Any exceptions.

Mr. Davis: We have none.

Mr. Abrams: I *expect* to your Honor's refusal to give requested instruction No. 12. Your Honor omitted it or did not wish to give it, I don't know. It sets out the other two lesser offenses, and your Honor did not mention them to the jury.

The Court: They are not in the instructions given.

Mr. Abrams: Your Honor omitted them?

The Court: Yes.

Mr. Abrams: May I note an exception.

The Court: Yes. The jury may now retire.

(The jury retired at 2:25 P. M. and were brought into court at 3:30 P. M.)

The clerk will call the roll of jurors. (Roll called and all answered present.)

Ladies and Gentlemen of the Jury, the court received this note from your Foreman: the Jury would like to have read the instructions concerning self defense; the jury is concerned whether action in self defense is justifiable in the event of initial provocation. Signed Augustine F. Gaynor.

The court will read to you again the instructions on self defense; please give the court your attention. [64]

Where one without fault is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony or some great bodily injury upon him and to afford grounds for reasonable belief that there is imminent danger of the accomplishment of this design, he may, acting under these fears alone, attack and even slay his assailant and be justified by the appearances.

A person may repel, force by force, in defense of person, property, habitation or life, against one who manifestly intends or endeavors, by violence or surprise to commit a known misdemeanor or felony, or either, or to do great bodily injury to his person, and the danger which would justify the defendant in the act charged against him may be either real or apparent, and the jury are not to

consider whether the defendant was in actual peril of his life or property, but only whether the indications were such as to induce a reasonable person to believe that he was in such peril of person, property, habitation or life. And if he so believed reasonably and had sufficient cause so believe, and committed the act complained of under such belief, even though it would appear that the other person was not armed, you must acquit the defendant.

The court instructs the jury that the acts which a defendant may do and justify under a plea of self defense depend primarily upon his own conduct, and secondarily, upon the conduct of the party assailed. There is no fixed rule applicable to every case, though certain general principles, well established, stand forth as guides for the action of men and measures for the jury's determination of their deportment.

The court instructs the jury that the mere apprehension of danger is insufficient to justify an attack. The fear must [65] have been produced by circumstances such as would be sufficient to excite the fears of a reasonable person. The law of self defense is founded upon necessity, and in order to justify the assault of another upon this ground, it must not only appear that the defendant had reason to believe, and did believe, that he was in danger of his life, or of receiving great bodily harm, but it must also appear to the defendant's comprehension, as a reasonable person, that to avoid such danger it was absolutely necessary for him to

use a deadly weapon at his assailant, if you find that the defendant was assailed.

Is that sufficient, Ladies and Gentlemen of the Jury?

The Foreman: Yes.

(Thereupon the jury retired and returned into court at 4:40 P. M. with a verdict of guilty of an assault with a deadly weapon.) [66]

May 3, 1944

The Clerk: United States v. Yates.

Mr. Mercado: If Your Honor please, may the record show that the defendant has filed a praecipe in this case which called for all of the communications by and between the Court and the jury, or if they were not available, to have the Clerk certify the true contents thereof, and that thereafter the Clerk advised me that Your Honor's memory was not clear as to what the exact contents were, and you directed that I notify the foreman of the jury and bring him here to testify as to the contents of those communications. Is that correct, Your Honor?

The Court: Yes.

AUGUSTINE F. GAYNOR,

called as a witness for the defendant.

My name is Augustine F. Gaynor and I was foreman of the jury in the case of United States vs. Yates. I recall that the jury received instructions from the Court while the jury was seated in the jury box and that thereafter we left to deliberate. Subsequently, we were recalled to the jury box and received further instructions from the Court, after which we retired for further deliberations. We received communications from the Court. Our first communication to the Court was a written request asking for the log of the boat on which it was charged the crime was committed. This communication was a memorandum in long hand written by myself. We knocked on the door and handed it to one of the court attaches. I do not see the attache in court now. We received a response from the Court which was a typewritten message from the Judge delivered to us by the same court attache to whom we delivered our original message. The note from the Court said, in effect, that the jury was not entitled to the log, as, I believe the reason was, that it had not been introduced in evidence. That is my con- [67] clusion. I would say it was about five lines on letter size paper, typewritten on letter size paper. This note I tore up, and as I do with all memoranda, threw it in the toilet bowl and flushed it through. Subsequently, we sent a second communication to the Court, which was a long-hand message, written by myself and sent through

(Testimony of Augustine F. Gaynor.)

an attache of the court. I recall only the substance of that communication. I would say the request was that the jury would like to have re-read to them the Court's instructions on self defense. The response from the Court was an instruction from the attache, who told us to come into Court and take our seats in the jury box, at which time the Court gave us certain instructions on self defense. We then retired from the courtroom for further deliberation. Subsequently, we sent another message to the Court, which was a written message, the same as the other messages, in long hand, by myself, through the court attache. The message asked if the jury was at liberty to return any verdict other than the two possible verdicts that were type-written and given to the jury by the court clerk when they first went into the jury room. I am giving you the substance of this message. In my pocket, if you wish me to refer to it, I have written out what I think I wrote in that message. (With leave of Court, the papers were marked Defendant's Exhibits "A" and "B"). These papers were prepared in my office yesterday afternoon, which was Tuesday, at approximately the hour of 1:45, a which time you were present, Mr. Mercado. You asked me to write down these statements, which I did, but you did not read the statements. The statements I wrote down are the substance of my memory and are to the best of my memory, but I am not positive of it. We received a verbal response from the Court to this communication. It

(Testimony of Augustine F. Gaynor.)

was a verbal response and was delivered by the court attache. I do not recognize that court attache [68] in this courtroom.

(Mr. Jones, a courtroom bailiff, was requested to step forward, which he did.)

I am quite positive it was not this gentleman. The attache knocked on the door, the door opened and he stood in the doorway. He did not shut the door behind him; the door was open at the time he delivered the verbal communication. He said: "That one of the verdicts that was before us would have to be our verdict." I am recalling the substance only. There was no other communication or correspondence between the Court and the jury, or the jury and the Court, to the best of my knowledge. Refreshing my recollection, from Defendant's Exhibits "A" and "B", my best recollection is that we sent a third message to the Judge, inquiring if we could give any other verdict outside of the two possible verdicts that were before us.

(Defendant offered the two exhibits in evidence to form part of the bill of exceptions and they were admitted by the Court and marked Defendant's Exhibits "A" and "B").

To the best of my knowledge, it took only a few minutes for the court attache to deliver the verbal message. I did not see anybody else present outside of the door at the time the message was delivered. There were no comments by the members

(Testimony of Augustine F. Gaynor.)

of the jury or myself to the court attache or any comment at all; not a word. He left immediately. I recall the appearance of both the defendant and his attorney, Mr. Sol Abrams, and I did not see them present at any time when these communications from the Court were delivered to us; the defendant was not present. What I have stated here is my best recollection in connection with this instruction, or request from me to the Court, the third one, in which we asked about the verdict, as to the contents of that message. [69]

Q. Do you recall any circumstance as to why you sent that communication? A. Yes, I can.

Q. Will you make an explanation, as brief as possible?

A. If I remember right, there was considerable discussion in the jury room about the case. Some one of the jurors asked could we make a recommendation of probation. Another juror, and I think it was myself, was discussing the matter of simple assault, because in the courtroom there was discussion of five possible verdicts that might be given, and we thought that we could get both questions answered at once by putting down a question which would cover both circumstances, that is, if we could change the typewritten verdict that was given to us by the clerk by adding guilty of such and such a charge, and adding the words, "We recommend probation", or if the jury could change the verdict which might come in with a recommendation of guilt

(Testimony of Augustine F. Gaynor.)

of simple assault. That is why I am quite positive that the question was framed as I have quoted it here.

I would describe the manner in which this court attache delivered the verbal message from the Court as just an answer like you might transmit a message —that it was given in just an ordinary tone of voice a simple answer to our question.

#### Cross Examination

Questions by Mr. Davis:

There were three communications from me as foreman to the Judge, all of which were written. The first response from the Court was typewritten; the other of the three was verbal and said, "Come into court and take your seats in the box". Referring to Defendant's Exhibits "A" and "B", I prepared these myself, and I am now testifying from the best of my recollection, which was no better yesterday than it is today. I would say that we dealt with the same court attache each time. I would not [70] be positive that I could recognize him if I saw him again as I have served on four cases and I might state that yesterday I did not know I was foreman of the jury until I thought it over, and I might be confused in the case if the man were to walk in here. In giving an explanation as to why I have a clear recollection of how the last communication was transmitted, I said that in the courtroom there had been some mention of five possible verdicts; I think that the attorney for the defendant either brought that fact up in his opening

(Testimony of Augustine F. Gaynor.)  
statement to the jury or in his closing statement. I did not hear the Judge make any mention of five possible verdicts, except, I think, that the Judge answered, when Mr. Abrams took an exception, the Judge said, "Only two verdicts could be returned", that he was eliminating the other three. I would not say that you, Mr. Davis, made any reference to five possible verdicts. To the best of my recollection, it was Mr. Abrams, the counsel for the defendant, either in his opening statement or his closing argument, argued that there could be five possible verdicts.

---

### DAVID J. BIRMINGHAM

Called as a witness for Defendant.

(Questions by Mr. Mercado).

I sat on the jury as one of the jurors in the case of United States vs. Yates. After we retired from the jury box the first time, there were three communications that were sent by the jury, through their foreman, to the Judge, and three responses from the Judge. The first communication concerned the log and was a written communication and we received a written response from the Court. As to the exact wording of either communication, I think the first communication simply said: "Your Honor, may the jury have the log?" as best I recall it, signed [71] by the foreman, Mr. Gaynor. That is my best recollection of the substance. Secondly, we made

(Testimony of David J. Birmingham.)

a request for further instructions on self defense, which was answered by an attache calling us back into the jury box; certain instructions were read and we retired again to deliberate. The third request was a written request by the foreman to the Court. As to the language of that, I am not sure whether the note requested whether it was possible to have any other form of verdict than that before us, or whether it asked whether any remmendation could be made by the jury; I am not sure. The foreman read this request to the jury before it went out and this is my best recollection. The response was from a court attache. I recognized him as he was sitting over there just a minute ago. Mr. Jones, I believe, was his name.

(Mr. Mercado: May the record indicate that the witness indicated Mr. Jones; he stepped out of the courtroom.)

When we made our first communication with the Court, I knocked on the door so it could be handed to the bailiff of the court and when Mr. Jones came back with the answer to the third communication, as I remember, he stood in the threshold. He didn't actually come into the jury room because he still had his hand on the door, and he simply pointed to the verdicts that were before us there and said, "Those three were all that were to be considered." I can't remember his exact wording; it was very brief. He didn't speak to anyone in particular. As I say, he was holding the door

(Testimony of David J. Birmingham.)

with one arm and he was standing in the threshold; he was not actually in the jury room; he was just standing on the threshold, holding the door. I could hear all of the words that he was saying very distinctly. The defendant's attorney, Mr. Abrams, was not present at that time. We could not see anybody in the hallway, because Mr. Jones was [72] standing in the doorway. There may have been bailiffs or someone there, but not in the jury room. I imagine that this jury room is about one hundred feet from the courtroom.

(Thereupon, the further hearing was continued until 4 o'clock P.M.)

---

### THOMAS F. JONES

called as a witness for the Defendant.

(Questions by Mr. Mercado).

I am a bailiff or cryer of the court for Judge Goodman at the present time. I recall the case of United States vs. Yates and I was acting as cryer for the Court at that time and was assigned to the jury after the jury retired. There were some communications that went between the Court and the jury. The form of the first communication was in a paper, as I remember correctly—a paper folded and handed to me, the contents I do not know, or have I ever known the contents, delivered to his Honor. I delivered such to him and took from him

(Testimony of Thomas F. Jones.)

a message to the jury and handed it to the deputy U. S. Marshal, and which he handed inside. It was either Mr. Kennedy or Mr. Cain—to be sure, I am not quite sure. The second communication was not sealed, the first was not sealed, as I remember. This was not sealed but folded. I delivered that to His Honor and a message was returned immediately. I believe the message which I returned was in printed form; I am not sure. I did not read this second message, but I did bring the jury back into the courtroom and at that time, certain instructions were read by His Honor, after which, I returned the jury to the jury room for further deliberation. There was a third communication. That was likewise a message, and I believe that was the third and last, and I think the answer I took back verbally. If I remember correctly, [73] it was, "Use the form already provided." And before the door was unlocked I asked Mr. Kennedy, or Mr. Cain, whoever the deputy was, to please listen to what I had to say to the jury. I don't know who was foreman, but the door was unlocked; Mr. Kennedy or Mr. Cain was there, and these were the words: "Use form already provided." That is all. I remember these words quite clearly. At the time His Honor gave me these instructions, I believe Mrs. Morgan, his secretary, was there and I think that is all who were present at the time. The defendant was not present and the defendant's counsel was not present.

(Testimony of Thomas F. Jones.)

The Court: I think they were communicated with on each occasion.

A. Yes, I believe they were.

The Court: Both attorneys, on both sides.

Mr. Mercado: Well, if there is some dispute on the point, Your Honor, I would like to bring Mr. Abrams here. He said that he received communications as to the first two of these, and we are raising no point as to those; but as to the third communication, neither the defendant nor Mr. Abrams has any recollection of any communication of any kind; they were totally ignorant of their existence.

The Court: Bring *there* here, if you wish.

Mr. Mercado: I will do that.

(Thereupon, further hearing was continued until tomorrow, Thursday, May 4, 1944, at 1:30 o'clock P.M.).

---

May 4, 1944. 1:30 o'clock P. M.

JOHN EDWARD YATES,

called as a witness for the Defendant.

I am the defendant in this case and was present in court during the taking of testimony, and I heard His Honor instruct the jury in this case prior to their leaving for deliberation [74] and I saw the jury go out for deliberation. The Court instructed the jury in my presence and they then

(Testimony of John Edward Yates.)

retired for deliberation. At one time thereafter, the jury was returned to this courtroom and the Court further instructed the jury on a point of law, after which the jury again retired for deliberation. I was never advised of any other communication by and between the Court and the jury. I was never advised by Mr. Sol Abrams that the jury had made a request for the ship's log or that the Court refused to give the ship's log to the jury. I knew nothing of the Court's refusal to give the ship's log to the jury. I never saw any communication that the foreman or any other member of the jury wrote to the Court, nor was I ever advised of any such communication during the trial or prior to this. I did not hear the bailiff, Mr. Jones here, state to the jury that they must return one of the verdicts submitted to them. I do not know where the jury room is and I never was present at the jury room. Mr. Abrams never advised me that there was a request from the jury for some instructions as to the type or character of the verdict which they could return. Prior to my sentence in my case, I never knew of those verdicts and never saw the verdicts and was never advised of the character or nature of those verdicts, nor did I know the language of those verdicts.

SOL ABRAMS,

called as a witness for the Defendant.

(Questions by Mr. Mercado).

I am an attorney at law and represented Mr. Yates in the case of the United States vs. Yates, tried before His Honor by myself. I was his only attorney. The evidence was taken in the presence of the defendant and I heard the Court [75] instruct the jury in the presence of the defendant, and also heard the Court instruct the jury to retire and I saw them retire for their deliberations. Subsequent to that, I saw the jury return and receive further instructions in this case, after which I saw them retire for further deliberation. I was advised of communications to the Court by the jury, the first communication, I think, was in connection with a request from the jury for an examination of the log book. I think His Honor called us into his chambers, Mr. Davis and I. I don't recall who else; possibly the clerk here. I think His Honor had the written request from the jury, requesting the log book; I am not sure whether His Honor showed it to us, but I think we did see it, and asked our advice on the matter, and I stated an objection to the jury's viewing the log book; I did not think it was proper and I voiced an objection to it; I think Mr. Davis agreed with me that it was not proper, and His Honor too, so it was decided not to show it to the jury; it was not proper. I am not sure, but I think I did see the communication that went from

(Testimony of Sol Abrams.)

the Court to the jury, but my recollection is, I think we did; I think His Honor had it there, but whether he actually read it or not, I am not too sure; I think His Honor had it in his hand at the time while talking to us.

The Court: Don't you recall that I asked both of the attorneys if it was agreeable to present it to the jury?

Mr. Abrams: Yes, and I raised an objection at that time and said I did not think it was proper to show it to the jury, inasmuch as it was only offered for identification, it was not in evidence.

Mr. Mercado: I believe it was in evidence.

A. Only in evidence for a limited purpose, that is right.

Q. Did you ever advise the defendant of this occurrence in [76] the court's *cases*?

A. I don't recall whether I did or not.

The Court: He was not present.

The defendant was not present. I don't recall definitely whether or not I ever advised the defendant of it. I do not recall any discussion with him concerning that at the time. I might have discussed it with him afterwards or while the jury was deliberating further. As to the second communication, I understand the jury requested further instructions on the subject of self defense, following which His Honor called them back into the courtroom and gave them further instructions on self defense, the law of self defense. I don't recall if I saw the particular paper on which the

(Testimony of Sol Abrams.)

jury requested that; I don't recall whether we were called in His Honor's chambers on that, or whether we were simply notified they requested instructions and were being brought in; my recollection is hazy on that.

The Court: Q. You recall they were brought in to the courtroom for further instructions?

A. Oh, I do recall that, yes, and I recall Your Honor giving them further instructions on the law of self defense, in the presence of myself and the defendant and the prosecuting attorney, and everybody else.

The Court was in session at the time the Court did give further instructions and there was no objection by counsel or exception taken to those instructions. I don't recall any particular discussion with the defendant in connection with the second instruction; we might have talked about it while the jury was deliberating; they were deliberating quite awhile and we might have talked about it, I don't recall any particular discussion. I do not recall any third communication between the Court and the jury. I think there was only two. I do not recall the Court ever advising me or any court attache calling my [77] attention to the fact that there had been a third communication between the Court and the jury. Nobody said to me that the Judge had sent a verbal communication to the jury concerning the verdict which they should render. I had no information concerning that prior to sentence, there were just the

(Testimony of Sol Abrams.)

two requests by the jury that we were called in on that I recall; if there were any others, I don't recall them. I don't know of any instructions or requests for instructions between the Court and the jury, concerning probation, leniency, or assault, or simple assault, and I am quite positive in my statement to that effect. As my recollection goes back, I do not recall anything else. If you recall it to me, you might refresh me, but I do not recall anything else.

Q. Was there anything in connection with the case that would particularly make you know that you did not receive such information, particularly in connection with the assault charge?

Mr. Davis: If Your Honor please, I have not objected to any questions so far because this is an informal hearing, and I want to find out the facts as much as counsel does, but I object to this question, I do not think it is proper. The witness has testified as far as his recollection goes that he is positive that he don't know of any other communication. I do not think that it is proper, inasmuch as the question has been asked and answered.

The Court: The objection is sustained.

Mr. Mercado: You did not, of course, advise the defendant of any such occurrence?

A. The only discussion that I remember of having with the defendant, that I recall talking to my client naturally on the subject of the several degrees of assault, and I do remember talking to him and telling him that His Honor would not

(Testimony of Sol Abrams.)

instruct [78] the jury on lesser degrees of assault, as I had requested, and that the jury's deliberations were confined by His Honor's instructions to the charge contained in the indictment, and one degree lesser removed from that, and I remember we talked considerable about that, and that was about the extent of it that I recall; that is about the extent of it that I recall; that is about the extent two times that the jury requested those things.

Q. Do you recall whether your argument to the jury was taken down by the reporter?

A. I don't know whether it was, or not.

Mr. Mercado: I believe Mr. Lehner was the reporter. Did you take it down, Mr. Lehner?

Mr. Lehner (the reporter): No, I did not, Mr. Mercado.

Mr. Mercado: Q. In connection with your argument to the jury, in view of the fact that the reporter did not take down your argument, did you argue to the jury concerning this lesser degree of offense of assault, or simple assault?

A. Very much so. I centered my argument around that.

Q. You know nothing of any communication between the Court and jury concerning the form or type of the verdict or that dispute in the jury room whether they could or could not return a verdict of simple assault, or probation, or ask for leniency? A. No.

(Testimony of Sol Abrams.)

Q. Did you observe or see the verdicts submitted to the jury?

A. No, I did not examine them.

Q. Were you ever offered the opportunity to see those verdicts?

A. I suppose I could have examined them if I wanted to, but I never thought of it; I knew what they were, I heard His Honor read them, and I knew what the submitted verdicts were.

Q. In other words, as I understand it, you tried the case on the theory that inasmuch as you had submitted the verdict for assault and that the Government had submitted, I believe the [79] record shows, three *constructions* for assault, and you had tried the case on behalf of the defendant on the theory that such instructions would be given and you were never stopped in any argument concerning that point, you had anticipated that such an instruction would be given and you defended the case on that theory?

Mr. Davis: Before he answers, I wish to make an objection, if Your Honor please. I am going to object to that question and any question along that line for the reason, as I understand it, Mr. Mercado filed a praecipe with the clerk to find out what communications, if any, passed between the Judge and the jury. Those communications were not available because they had been destroyed. I understand Your Honor made an order permitting Mr. Mercado to put on oral testimony as to what communications passed between the Court and

(Testimony of Sol Abrams.)

jury for the purpose of preparing a bill of exceptions. I think he is really limited to that in this hearing. I do not see what Mr. Abrams' theory of the case has to do with this hearing, whether he tried the case on one theory or another. I think we are limited to the issue of finding out whether or not there were any communications and if Mr. Abrams knews of the communications.

Mr. Mercado: If it please the Court, my reason for asking that question is this: The record will show that the defendant did request an instruction, No. 12, I believe, on assault. The record will further show that at the conclusion of the trial the Court did not give that instruction. The record will further show that there was an objection on the part of Mr. Abrams to the Court for not giving that instruction, that the Court declined to give that instruction and an exception had been saved; the legal point is whether the defendant had been denied a jury trial by virtue of your Honor's excluding the instruction as to simple assault or assault, I believe, as the statute describes it. [80] Now, the reporter has indicated that there was no basis for my ascertaining what the argument of Mr. Abrams was in the case. The reporter states that the argument was not taken down, and I, therefore, inquired of Mr. Abrams if he argued the point of simple assault. We are here in order to perfect the bill of exceptions as to what occurred. I am unable to determine from the reporter's transcript if he made that argument for

(Testimony of Sol Abrams.)

the reason it was not taken down. Now, I am asking Mr. Abrams this question in order to determine what occurred in connection with his argument of the case. It is important, because if Your Honor did send in this informal instruction to the jury room through a bailiff outside of the presence, and without the knowledge, of either the defendant or the defendant's counsel, I think the argument to the jury is very important in determining whether Your Honor might have erred in submitting any instruction to the jury.

The Court: Objection sustained.

Mr. Mercado: Exception. That is all.

#### Cross Examination

(Questions by Mr. Davis).

Mr. Davis: Q. Mr. Abrams, you did offer an instruction on simple assault, or lesser offense, did you not? A. Yes.

Q. The Judge refused to give the instruction on the lesser offense? A. That is right.

Q. And gave the instruction on the offense alleged in the indictment which was assault, or attempt to commit murder, or assault with a deadly weapon? A. Yes.

Q. You objected to His Honor's refusal to give that instruction, did you not?

A. I noted an exception.

Q. You noted an exception.

Q. You noted an exception to his ruling?

A. Yes.

(Testimony of Sol Abrams.)

Mr. Davis: That is all. Might I ask Mr. Evensen, the [81] clerk, if he has a copy of the verdicts that were sent in to the jury.

Mr. Evensen: (The Clerk). I never keep the copies. I only keep the original that is signed by the foreman of the jury, which is filed as part of the records of the Court.

Mr. Mercado: But, you do not have any evidence as to any language of the verdicts that was submitted to the jury?

Mr. Davis: As I understand it, the first form was guilty of assault with intent to commit murder.

Mr. Evensen: That is correct.

Mr. Davis: And the second verdict was guilty of assault with a deadly weapon or a dangerous weapon.

Mr. Evensen: That is correct—it was a deadly weapon. Then there was a third one as to simple assault, which I was asked to destroy and not submit to the jury.

Mr. Davis: So, the three verdicts that went to the jury were: Not guilty; guilty of assault with an attempt to commit murder; guilty of assault with a deadly weapon.

The Clerk: Yes.

Mr. Davis: I will stipulate that those were the contents of the three verdicts. [82]

**STIPULATION**

It is hereby stipulated by and between the plaintiff and the defendant that the within proposed bill of exceptions is in narrative form as far as the interest of justice permits and truthfully represents the evidence and proceedings which took place at the trial and the hearing thereafter and the same may be settled as the Bill of Exceptions of the evidence and proceedings to be used by the parties on the appeal of this case to the Ninth Circuit Court of Appeals.

Dated May 20, 1944.

**LOUIS R. MERCADO**

Attorney for Defendant

**WILLIAM E. LIEHING**

Ass't U. S. Attorney for  
plaintiff. [83]

---

[Title of District Court and Cause].

**SPECIFICATIONS OF ERROR**

The learned Court erred in not giving Defendant's requested instructions on assault and in not giving the three requested instructions by the Government, or either of them, on assault, copies of which are appended hereto, in this:

(a) There is evidence tending to show that the Defendant committed assault only, if anything, in that the Defendant testified that he thought the witness Olsen was attacking him and that he did

not intend or mean to use the knife he had in his hand against Olsen, but only intended to ward off the blow of assailant Olsen, which testimony is corroborated by the only eye witness who observed the actual affray;

(b) The entire case was tried and argued by the Government and the Defendant both on the theory that the evidence justified the return of a verdict of assault if the evidence relevant thereto was believed; whereas, the learned Court permitted the case to be tried and argued both by the Government and the Defendant on the theory that an instruction on assault would be given, lulling Defendant and Defendant's counsel into unfortunate false security, and it was not until the final instructions were given that either the Government or the Defendant, or his counsel, knew that the instructions of assault would not be given, thereby, in fact, depriving the Defendant of a jury trial and the due process of law on the issues upon which the instructions actually were given;

(c) The learned Court erred in not instructing or advising the Defendant that on three occasions the jury had transmitted communications to him and that on the first two of those occasions, only Defendant's counsel was advised of the requests and the Defendant was at all times ignorant of all [84] three requests for instructions; that further the learned Court failed to advise the defendant of his response to the jury except in the second instance when the jury was returned to the court-room and given further instructions; that on the

third occasion of the request of the jury for further instructions the learned Court further erred in advising his Cryer, outside of the presence of and without the knowledge of either the defendant or his counsel, to go to the jury room and outside of the presence of and without the knowledge of either the defendant or his counsel and instruct the jury on a point of fact and law, the exact nature of the instruction being now impossible of determination due to conflicting testimony as to what was exactly said by the Cryer, although witnesses were in general agreement that he instructed the jury on behalf of the learned Court to return a verdict on the forms submitted to it, which did not include an instruction for assault and on which subject the jury had requested further instructions:

For the reasons stated above in Specifications (a) (b) and (c) the learned Court erred in not instructing the jury to return a verdict for the defendant and in not granting defendant's motion for a new trial in that the verdict and judgment was contrary to the law and evidence in the case and in contravention of defendant's constitutional right and without due process of the law, equal protection of the law, and of a full jury trial, in violation of Articles 3, 4, 5, and 6, of the Amendments to the Constitution of the United States for the reasons stated both severally and separately

and cumulatively in the said Specifications (a), (b), and (c) above.

LOUIS R. MERCADO

Atty. for defendant. [85]

Copy & print instructions of deft. #12, and your #23, as part hereof.

[Endorsed]: Filed Oct. 21, 1944. [86]

---

GOVERNMENT'S PROPOSED  
INSTRUCTION

INSTRUCTION No.

In all criminal cases the defendant may be found guilty of any offense necessarily included in the offense charged in the indictment. Title 18 USC Section 455 also includes the following:

"Whoever with intent to do bodily harm and without just cause or excuse, shall assault another with a dangerous weapon, instrument or other thing"

shall be punished as the law provides. Thus a defendant charged with an assault with intent to commit murder as is the defendant here, may be found guilty of assault with a dangerous weapon.

(Plaintiff's Instructions to Jury.)

Dated: March 22, 1944.

As Given,

MARTIN I. WELSH,

U. S. District Judge. [87]

DEFENDANT'S PROPOSED  
INSTRUCTIONS

## INSTRUCTION No. 12

In all criminal cases the defendant may be found guilty of a lesser offense included in the offense charged in the indictment.

Therefore, the following lesser offenses are included in the offense charged in the indictment, and if you find that the defendant committed an offense you may find the defendant guilty of committing any one or more of the following lesser included offenses:

1. "Whoever with intent to do bodily harm and without just cause or excuse, shall assault another with a dangerous weapon, instrument or other thing."
2. "Whoever shall unlawfully strike, beat, or wound another."
3. "Whoever shall unlawfully assault another."

If you find that the defendant committed an offense and that the offense committed was not that stated in the indictment but one of the above lesser included offenses, then you should so designate in your verdict upon which said lesser included offense above enumerated you find the defendant guilty.

(From Defendant's Proposed Instructions which were not filed.) [88]

[Title of District Court and Cause].

**PRAECIPE**

To the Clerk of Said Court:

Sir:

Please issue In order to properly prepare the transcript on appeal you are hereby requested to include therein :

1. The indictment of the defendant and his plea thereto;
2. The dicision of the court and verdict of the jury;
3. The motion for a new trial;
4. Judgment and sentence of the Court;
5. Notice and order allowing appeal;
6. Bond of Defendant on appeal;
7. The Bill of exceptions;
8. Specification of Errors;
9. This Praecipe;
10. Orders extending time to file Bill of Exceptions March 30, 31, April 24;
11. Appearance of Louis R. Mercado;
12. Order setting time to take testimony May 2, 3, 4 and 22nd;
13. Order settling Bill of Exceptions;
14. Government's proposed instruction #23 and defendant's #12.

**LOUIS R. MERCADO**  
Attorney for dft.

[Endorsed]: Filed Oct. 12, 1944. [89]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to 89, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of The United States of America vs. John Edwards Yates, No. 28423-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$7.75 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 6th day of January A. D. 1945.

(Seal)

C. W. CALBREATH,

Clerk

M. E. VAN BUREN

Deputy Clerk [90]

[Endorsed]: No. 10973. United States Circuit Court of Appeals for the Ninth Circuit. John Edward Yates, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 27, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

---

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10973

JOHN EDWARD YATES,



Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

The Appellant adopts the Assignment of Errors as his Points on Appeal.

LOUIS R. MERCADO

One of the Attorney's for Appellant.

[Endorsed]: Filed Feb. 13, 1945.

No. 10,973

IN THE

United States Circuit Court of Appeals  
For the Ninth Circuit

---

JOHN EDWARD YATES,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

Upon Appeal from the District Court of the United States for the  
Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

---

ALFRED J. HENNESSY,

De Young Building, San Francisco 4,

*Attorney for Appellant.*

FILED

MAY 15 1945

PAUL P. O'BRIEN,  
CLERK



## Subject Index

---

	Page
Statement of the Jurisdictional Facts .....	1
Statement of Case and Questions Involved.....	2
Testimony of Henry Frederick Olsen.....	4
Testimony of John Edward Yates .....	5
Testimony of John R. De Lora .....	6
Specifications of Error .....	7
Argument .....	10
The judgment of conviction is void and a nullity because the verdict returned by the jury and duly recorded by the court reads as follows:	
"We the jury, find John Edward Yates, the defendant at the bar, guilty of an assault with a deadly weapon."....	11

---

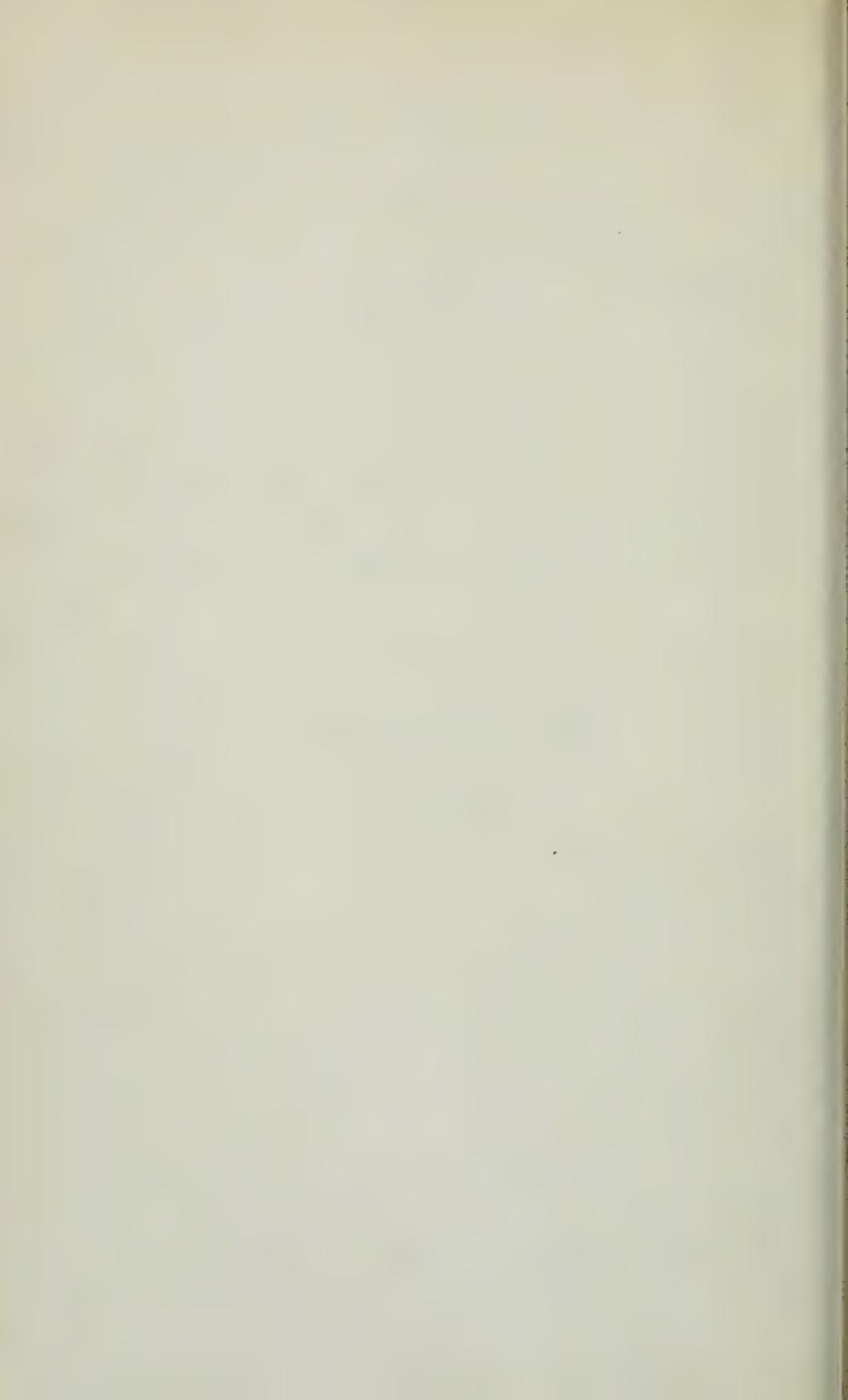
## Table of Authorities Cited

---

Cases	Page
Acres v. U. S., 164 U. S. 388, 41 L. Ed. 481.....	10
Ex parte Donahue, 65 Cal. 474.....	10
Roe v. U. S., 164 U. S. 546, 512 L. Ed. 547.....	10
U. S. v. Buzzo, 85 U. S. 125, 21 L. Ed. 812.....	11
U. S. v. Jackalow, 66 U. S. 484, 17 L. Ed. 225.....	12
Wallace v. U. S., 162 U. S. 466, 40 L. Ed. 1039.....	10

## Statutes and Texts

3 Cal. Jur. page 224, Section 32 .....	10
U. S. C., Title 18, Section 455 .....	11



No. 10,973

IN THE

**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

JOHN EDWARD YATES,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

**Upon Appeal from the District Court of the United States for the  
Northern District of California, Southern Division.**

**APPELLANT'S OPENING BRIEF.**

---

**STATEMENT OF THE JURISDICTIONAL FACTS.**

The appeal herein presented by John Edward Yates is from an order of the District Court of the United States for the Northern District of California, Southern Division, denying his motion for a new trial in criminal case No. 28,423, entered on the 23rd day of March, 1944 (R. p. 10), and from the judgment of the District Court entered on March 23, 1944, sentencing the said appellant, John Edward Yates, to serve a sentence of 5 years in a federal penitentiary. (R. p. 10.) Notice of appeal from said order and judgment was filed by appellant on March 23, 1944. (R. p. 11.) On March 28, 1944, appellant filed his statement of

points on which he intended to rely on his appeal.  
(R. p. 13.)

The appellant, John Edward Yates, was a messman aboard the armed transport, "President Johnson", and during an altercation with a sailor, Henry Frederick Olsen, stabbed Olsen while on the high seas on waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state of the United States, to-wit, at Purvis Bay, Florida Islands, Solomon Islands Group, and after the occurrence the defendant was first brought into the City and County of San Francisco, within the Southern Division of the United States District Court, and within the jurisdiction of this Court. (R. pp. 2, 3 and 24.)

---

#### **STATEMENT OF CASE AND QUESTIONS INVOLVED.**

The appellant, John Edward Yates, was a messman aboard the Army Transport "President Johnson". Henry Frederick Olsen was a sailor aboard the same ship. They were both members of the crew of the "President Johnson". (R. p. 25.) Olsen's rating was that of a boatswain. A boatswain acts as foreman of the sailors. He is a civilian employee and not in the armed forces of the United States. Yates is a messman. A messman is one who works in the petty officers' mess, taking care of the petty officers and serving their meals like a waiter. Petty Officer Olsen is a superior in rank to Yates, but he is not over him. Olsen has no connection with the steward's department; Yates waits on him as a waiter, but Olsen is not

over him in the line of duty. Olsen is classed as a petty officer; Yates is not. Yates is a civilian employee on the boat. (Cross-examination of Captain Herbert J. Ehman of the "President Johnson". (R. pp. 25 and 26).)

There was a shortage of messmen on the said transport and there was some delay in Olsen getting his breakfast. He complained to Yates about the delay and when Olsen was finally served took offense at the manner of placing his plate on the table and got up from the table with the intention of hitting Yates and according to Olsen there was a clinch and something in the nature of a fight which ended in the alleyway outside the messroom.

"Q. Did he bounce the plate down on the table then?

A. Yes.

Q. Did you have any words with him at that time?

A. No, I got up from the table with the intention of hitting Yates, but I did not.

Q. You did not hit him?

A. No, we got engaged in some kind of a scuffle in the corner of the messroom which ended up in the alleyway outside." (Testimony of Henry Frederick Olsen, who was cut. (R. p. 28).) Also on pages 34 and 35 there is testimony to the same effect.

Yates' testimony was to the effect that he was without help in serving 40 or 50 men and that Olsen demanded priority over the other men, which he was unable to accord him; that he served Olsen in the

same manner as the other men. There was one mess-man lacking. (R. p. 33, line 7.) Olsen was the aggressor according to his own testimony:

**Testimony of Henry Frederick Olsen.**

"A. At that time I got up when the food was set in front of me, with the intention of hitting Yates.

Q. Just a minute, as soon as he laid the plate down in front of you did Mr. Yates say anything to you?

A. No. (33)

Q. Did he hit you?

A. No.

Q. Did he push you?

A. No.

Q. He just merely laid the plate down in front of you and you immediately got up?

A. Yes.

Q. With the intention of hitting him?

A. Yes.

Q. Did you jump up?

A. Yes, I jumped up.

Q. You jumped up at him, didn't you?

A. Yes.

Q. How far away was he when you jumped up with the intention of hitting him?

A. He was at the next table.

Q. How far away from you?

A. About ten feet away from my table.

Q. Did you make a dash for him?

Q. He had his back to you and he walked away from you?

A. Yes.

Q. As you reached him you struck him, didn't you?

A. No.

Q. Are you sure of that?

A. Yes.

Q. What did you do?

A. He turned around and we got into some kind of scuffle and clinched in the corner of the messroom."

From testimony of Henry Frederick Olsen (R. pages 34 and 35), Yates said to me "What is the matter with you, anyway?" (R. p. 35.)

**Testimony of John Edward Yates.**

"Q. You were on the way to the messroom?

A. Yes.

Q. You say you used that knife in your work?

A. Yes.

Q. To do what?

A. Well, I was supposed to carry that to clean plates.

Q. An ordinary table knife?

A. Yes.

Q. Now, when Mr. Olsen raised his right hand, what did you say, what did you say?

A. When he raised his right hand I raised my hand, and when I raised my hand he seen the knife and he started this way and I jabbed at him like that.

Mr. Abrams. Q. What did you think when he raised his hand?

A. I didn't know what he was doing.

A. I thought he was going to hit me.

Q. You thought he was going to strike you?

A. Yes.

Q. Go ahead.

A. When I raised my hand he seen my knife and he came toward me.

Q. He came toward you with his arm up?

A. No, he did not have his arm up when he came toward me.

Q. Then you stabbed at him with the knife?

A. Yes, stabbed at him with knife.

Q. Did you jab hard?

A. No.

Q. When you jabbed at him with it did you intend to kill him?

A. I had no intention of even jabbing him with the knife, I was nervous and excited, and I had no intention on my part whatsoever of doing that."

(Testimony of John Edward Yates on pp. 52 and 53.)

#### **Testimony of John R. De Lora.**

"I was in the pantry; at the time I was cutting some grapefruit, and I heard the commotion out there, but I did not see the beginning of the fight, and then I saw Mr. Yates going down towards the forecastle, and he was bleeding and he had his shirt all torn."

#### **Cross-Examination of Mr. De Lora.**

"I was standing there when Yates came back. I saw Mr. Olsen started to rush toward Yates. They were about two or three feet apart. Yates was still walking toward Olsen, toward the messroom. To go to the messroom he had to go by Olsen. From the

direction I saw Yates, I would say he was going to go by and go to work. He came at Yates with his hands up, like he was going to punch him. His hand was up; it was like he was rushing out to grab him." (John De Lora's testimony R. pp. 60 and 61.)

Henry Frederick Olsen by his own admission was the aggressor. He jumped up in the messroom and rushed at Yates and attacked him and in the struggle forced Yates out into the alleyway where the fight continued and there according to Olsen testified (R. p. 29) Yates said to him, "What's the matter with you anyway?"

The testimony of John R. De Lora (R. pp. 60 and 61) at the second encounter in the alleyway where Olsen again was the aggressor and Yates was only protecting himself.

---

#### SPECIFICATIONS OF ERROR.

The learned Court erred in not giving defendant's requested instructions on assault and in not giving the three requested instructions by the Government, or either of them, on assault, copies of which are appended hereto, in this:

(a) There is evidence tending to show that the defendant committed assault only, if anything, in that the defendant testified that he thought the witness Olsen was attacking him and that he did not intend or mean to use the knife he had in his hand against Olsen, but only intended to ward off the blow of assailant Olsen,

which testimony is corroborated by the only eye-witness who observed the actual affray.

(b) The entire case was tried and argued by the government and the defendant both on the theory that the evidence justified the return of a verdict of assault if the evidence relevant thereto was believed; whereas, the learned Court permitted the case to be tried and argued both by the government and the defendant on the theory that an instruction on assault would be given, lulling defendant and defendant's counsel into unfortunate false security, and it was not until the final instructions were given that either the government or the defendant, or his counsel, knew that the instructions of assault would not be given, thereby, in fact, depriving the defendant of a jury trial and the due process of law on the issues upon which the instructions actually were given.

(c) The learned Court erred in not instructing or advising the defendant that on three occasions the jury had transmitted communications to him and that on the first two of those occasions, only defendant's counsel was advised of the requests and the defendant was at all times ignorant of all [84] three requests for instructions; that further the learned Court failed to advise the defendant of his response to the jury except in the second instance when the jury was returned to the court room and given further instructions; that on the third occasion of the request of the jury for further instructions the learned Court further erred in advising the Cryer, outside of the presence of and without the knowledge of either the defendant or

his counsel, to go to the jury room and outside of the presence of and without the knowledge of either the defendant or his counsel, and instruct the jury on a point of fact and law, the exact nature of the instruction being now impossible of determination due to conflicting testimony as to what was exactly said by the Cryer, although witnesses were in general agreement that he instructed the jury on behalf of the learned Court to return a verdict on the forms submitted, to it, which did not include an instruction for assault and on which subject the jury had requested further instructions:

For the reasons stated above in Specifications (a) (b) and (c) the learned Court erred in not instructing the jury to return a verdict for the defendant and in not granting defendant's motion for a new trial in that the verdict and judgment was contrary to the law and evidence in the case and in contravention of defendant's constitutional right and without due process of the law, equal protection of the law, and of a full jury trial in violation of Articles 3, 4, 5, and 6, of the Amendments to the Constitution of the United States for the reasons stated both severally and separately and cumulatively in the said Specifications (a), (b), and (c) above.

(d) The judgment of conviction is void and a nullity because the verdict returned by the jury and duly recorded by the Court, reads as follows:

“We the jury find John Edward Yates, the defendant as Guilty Of An Assault with a Deadly Weapon.”

**ARGUMENT.**

The evidence adduced at the trial on the admissions of Olsen, the other party to the fight, prove conclusively that Olsen was the aggressor and rushed at Yates and made an unwarranted attack on him. That Yates broke away from him and went away and was returning to his work when he was again attacked by Olsen; De Lora was an eye witness to the second attack. The evidence discloses a clear case of justifiable self defense in the defense of his person.

*Roe v. U. S.*, 164 U.S. 546, 512 L. Ed. 547;  
*Acres v. U. S.*, 164 U.S. 388, 41 Law. Ed. 481;  
*Wallace v. U. S.*, 162 U.S. 466, 40 Law. Ed. 1039.

The Court should have given defendant's requested instruction on simple assault and the three requested instructions by the government, or either of them on simple assault. The defendant was convicted of the crime of an assault with a deadly weapon. (R. p. 9.) Assault is an included offense and the Court should have given the requested instruction.

"The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged or of an attempt to commit the offense. Thus the offense of assault with a deadly weapon is necessarily included in that of an assault to commit murder and where the charge is assault with a deadly weapon, the jury may return a verdict of simple assault.

3 Cal. Jur. page 224, Sec. 32.  
*Ex parte Donahue*, 65 Cal. 474.

Defendant's proposed instruction No. 12, page 101, of the transcript of the record should have been given.

That the learned Court erred to the prejudice of the defendant when he instructed the jury on a point of fact and law without bringing them into Court and instructing them in the presence of the defendant and his counsel there can be no doubt. The exact nature of the instruction the defendant and his counsel were unable to ascertain and were therefore unable to take an exception to it.

---

**THE JUDGMENT OF CONVICTION IS VOID AND A NULLITY  
BECAUSE THE VERDICT RETURNED BY THE JURY AND  
DULY RECORDED BY THE COURT READS AS FOLLOWS:**

**"WE THE JURY, FIND JOHN EDWARD YATES, THE DEFENDANT AT THE BAR, GUILTY OF AN ASSAULT WITH A DEADLY WEAPON."**

The verdict returned by the jury, and recorded, is utterly void and a nullity because it does not use the words "as charged" or state all of the elements of the criminal offense depicted and delineated by Section 455, Title 18, U. S. C., which reads in part as follows:

"Whoever with intent to do bodily harm and without just cause or excuse, shall assault another with a dangerous weapon, instrument or other thing \* \* \*" shall be punished as the law provides.

In the case of *U. S. v. Buzzo*, 85 U. S. 125, 21 L. ed. 812, the syllabus reads as follows:

"On an information under the Ninth Section of the Internal Revenue Act of July 13th, 1866,

which enacts that any person who shall issue any instrument, etc., for the payment of money, without the same being duly stamped, with intent to evade the provisions of this act, shall forfeit and pay, etc., an intent to evade is of the essence of the offense, and no judgment can be entered on a special verdict which, finding other things, does not find such intent."

In the case of *U. S. v. Jackalow*, 66 U. S. 484, 17 L. ed. 225, Mr. Justice Bradley, speaking for the Supreme Court, said:

"As in this case the intent is the essence of the crime, and is not found, no judgment can be entered on the verdict, whether the facts disclosed therein required a stamp to be affixed to the draft or not. To decide the question proposed, therefore, would avail nothing. An imperfect verdict, or one on which no judgment can be rendered, must be set aside, and a *venire de novo* awarded. The case must therefore be dismissed."

It is respectfully urged that the judgment of conviction, and the order denying and refusing a new trial, should be reversed.

Dated, San Francisco,  
May 14, 1945.

ALFRED J. HENNESSY,  
*Attorney for Appellant.*

No. 10,973

IN THE

**United States Circuit Court of Appeals  
For the Ninth Circuit**

---

JOHN EDWARD YATES,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

**BRIEF FOR APPELLEE.**

---

FRANK J. HENNESSY,

United States Attorney,

JAMES T. DAVIS,

Assistant United States Attorney,

Post Office Building, San Francisco 2,

*Attorneys for Appellee.*

FILED

12 20 1945

PAUL P. O'BRIEN,  
CLERK



## **Subject Index**

---

	<b>Page</b>
Jurisdictional Statement .....	1
Statement of the Case .....	2
Questions .....	11
Argument .....	11
1. The court did not err in refusing to give the requested instructions on simple assault .....	11
2. The court did not err in its communications to the jury	13
3. The judgment of conviction is not void or a nullity...	16
Conclusion .....	16

## Table of Authorities Cited

---

Cases	Page
Ah Fook Chang v. United States, 91 F. (2d) 805.....	15
Chadwick v. U. S., 117 F. (2d) 902, cert. den. 61 S. Ct. 1109, 313 U. S. 585, 85 L. Ed. 1541.....	16
Dwyer v. U. S., 17 F. (2d) 696, cert. den. 47 S. Ct. 767, 274 U. S. 756, 71 L. Ed. 1336.....	15
Goode v. State, 152 So. 266.....	15
Gozner v. U. S., 9 F. (2d) 603.....	16
Grock v. U. S., 289 F. 544, 53 App. D. C. 146.....	16
Mattingly v. U. S., Fed. Cases No. 9295 .....	16
Miller v. U. S. (C.C.A.-9), 4 F. (2d) 384.....	15
Outlaw v. U. S. (C.C.A. Tex.), 81 F. (2d) 805, cert. den. 56 S. Ct. 747, 298 U. S. 665, 80 L. Ed. 1389.....	15
People v. Moon (Cal.), 45 P. (2d) 384.....	13
People v. Morales, 60 Cal. App. 196.....	15
Phillips v. U. S., 264 F. 657, cert. den. 40 S. Ct. 584, 253 U. S. 491, 64 L. Ed. 1028.....	16
Rumley v. U. S., 293 F. 532.....	15
State v. Coffman (Or.), 136 P. (2d) 687.....	13
State v. Estep, 24 P. 986, 44 Kan. 572.....	13
State v. Foley, 25 P. (2d) 565, 174 Wash. 575.....	13
State v. Gonzales (Wyo.), 23 P. (2d) 354.....	13
State v. Haines, 15 S. E. 555 .....	15
State v. McDonald, 149 P. 279, 51 Mont. 1.....	13
State v. McGowan, 93 P. 552, 36 Mont. 422.....	13
State v. McPhail, 81 P. 683, 39 Wash. 199.....	13
State v. Mowry, 15 P. 282, 37 Kan. 369.....	13
U. S. v. McGuire, 64 F. (2d) 485, cert. den. 54 S. Ct. 63, 290 U. S. 645, 78 L. Ed. 560.....	15
U. S. v. Walsh, 22 F. 644 .....	16
Valdez v. U. S., 244 U. S. 432 .....	15
 <b>Codes</b>	
United States Code:	
Title 18, Section 455 .....	1
Title 28, Section 41, subdivision 2 .....	2
Title 28, Section 225, subdivisions (a) and (b).....	2

No. 10,973

IN THE

**United States Circuit Court of Appeals  
For the Ninth Circuit**

---

JOHN EDWARD YATES,

vs.

*Appellant,*

UNITED STATES OF AMERICA,

*Appellee.*

**BRIEF FOR APPELLEE.**

---

**JURISDICTIONAL STATEMENT.**

This is an appeal from the judgment of conviction (Tr. 10-11) of the District Court of the United States for the Northern District of California, Southern Division, convicting the appellant, after a jury trial, of violation of Title 18, United States Code, Section 455. The indictment alleged that on board an American vessel on waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state of the United States the appellant assaulted one Henry Frederick Olsen, with a knife, with malice aforethought and with intent to kill the said Olsen (Tr. 2). The appellant was found guilty of the lesser included offense of assault with a deadly weapon (Tr. 9).

The Court below had jurisdiction under the provisions of Title 28, United States Code, Section 41, subdivision 2. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28, United States Code, Section 225, subdivision (a) and subdivision (b).

---

#### **STATEMENT OF THE CASE.**

On February 4, 1944 the S.S. "President Johnson", an armed American transport, was at anchor in Purvis Bay, Florida Island, Solomon Islands Group. The first American port at which the vessel touched subsequent to that date was San Francisco, California (Tr. 25-26).

The appellant John Edward Yates, and one Henry Frederick Olsen, were members of the crew of the vessel on the voyage in question. Olsen, a Petty Officer, was rated as a Boatswain or foreman of the sailors and Yates was a messman, or waiter, in the Petty Officers' mess. Olsen was superior in rank to Yates but was not his superior officer, as Olsen was in charge of the sailors and had no connection with the steward's department of which Yates was an employee (Tr. 25-26).

At about 7:40 A.M. on the morning of February 4, 1944, Olsen first saw the appellant in the mess room where the appellant was waiting on table, serving about fifteen men. Olsen sat at one of the two tables and, after waiting about five or ten minutes without being served, asked the appellant where the other

messman was as he had not been waited on. The appellant said "it don't concern me" (Tr. 27-28) and, after some discussion, Olsen reported the matter to the Third Steward. Thereafter, Olsen was served by the appellant, Olsen claiming that the latter "threw it in front of me on the table" (Tr. 28).

Olsen stated that he got up from the table with the intention of hitting Yates, but that he did not do so. A scuffle ensued and the two men wrestled out of the room and into the alleyway but no blows were struck and, after some discussion, Olsen went back and ate his breakfast (Tr. 27-29).

After finishing his breakfast about five minutes later, Olsen left the mess hall and engaged in a conversation with the Third Steward, one William A. Collins, in the passageway outside near a stairway, at a point about five feet from the entrance to the mess hall where the passageway is about five or six feet wide. Olsen was leaning on a rail with his back to the mess hall; the Third Steward was standing by his side (Tr. 29).

The next thing Olsen remembers is being stabbed by the appellant. In this connection Olsen testified (Tr. 30-31):

"A. As I was standing there I felt a stab in the right side of my back and also in my arm, and I looked around, and I saw Yates standing there with a kind of a pointed-looking knife in his hand.

Q. You were talking, as you say, and the first thing you noticed—did you hear anything said before you felt this stab in your side?

A. No.

Q. Where was this stab in the side?

A. It was in the right side.

Q. Right side?

A. Yes.

Q. Where, in relation to the front or back of your body?

A. It was in the back of my body.

Q. You say you felt this stab?

A. Yes.

Q. What was the next thing that you did?

A. Well, I turned around so quickly that I squirmed my body something like this, and I looked around, and I saw Yates standing there with this knife. That is all I remember, I run like everything. The knife was a pointed-looking knife, from what I saw of it, I didn't see much of it; it had a blue blade, I couldn't tell you for sure how long the blade was, but approximately it was on or about ten inches—I would say ten or twelve inches. I couldn't say for sure if it was sharp on both sides or pointed, because I just saw it a mere glimpse, and I ran as fast as I could upstairs. I did not hear anything said. I went to the ship's hospital for first aid.

Q. Do you recall whether or not you were stabbed in any other place?

A. It went in my back and three times in my arm.

Q. The first wound you remember was in the back?

A. Yes.

Q. Then you say you squirmed around. Did you turn facing Yates then?

A. Only part ways, my side was toward him.

Q. Do you remember being stabbed in the arm three times?

A. No, I don't remember that, even, it all happened so quickly that I only (31) remember this stab in my back. That is all I do remember. I went immediately to the hospital and remained there about eleven days. I returned to work about March 4th, but I couldn't fulfill the duties at the present time as a boatswain or a seaman. I never had any trouble with Mr. Yates previous to this affair, never any arguments or fights. I have been on the vessel about a year and two months; Yates was on the vessel only for the last trip."

(Tr. 30-31.)

Olsen's description of the occurrence was unshaken on cross-examination (Tr. 31-39).

WILLIAM A. COLLINS, the Third Steward, corroborated the testimony of Olsen in every detail. His description of the affray is, in part, as follows (Tr. 38-42):

"I first saw Olsen on that morning when he came to me and told me that the service in the mess room was rather slow, and I told him to go back and sit down and I would see he got his breakfast. At this time I was in the passageway between the mess room and the galley. Olsen went back to the mess room. Yates was then in the mess room. I next saw Olsen and Yates when they came out of the mess room together, scuffling; they were locked together, wrestling. I saw no blows struck by either party. They broke up voluntarily. The only thing I heard them say at

that time is, Yates said to Olsen 'What is the matter with you?', and Olsen said 'What is the matter with you?'. They both broke up right after that. Olsen went back into the mess room and sat down to eat his breakfast, and Yates went back to work in the mess room. I observed Yates at that time and I did not see any cuts or bleeding on him. Yates was wearing an upper, and I noticed after they had broken away that it was torn. The next time that I saw Olsen was after he finished breakfast; about five minutes elapsed from the time I saw them break up and Olsen came out. Mr. Olsen came out of the mess room and came over to me and started to talk to me; his left side was toward the mess room door; we were facing each other.

Q. What was the next thing that took place after that while you were standing there talking?

A. Yates came out of the mess room with a knife and stabbed Olsen with it. (37)

Q. You say Yates came out of the mess room?

A. Yes.

Q. So that at this time, to the best of your recollection, you were facing up in this direction and Olsen facing toward you?

A. Yes.

Q. With his left side toward the door?

A. Yes.

Q. And Yates came out of the door?

A. That is right.

Q. Did you see or hear Yates say anything as he came out of the door?

A. He said something about, 'I will kill you, you son-of-a-bitch' or words to that effect. I didn't pay much attention to it.

Q. To the best of your recollection that is what he said?

A. That is right.

Q. Do you know whether or not at that time he had a knife in his hand?

A. Yes, he had.

Q. Did you see the knife?

A. Yes.

Q. Will you describe it for us?

A. I did not see it very plainly, but it looked like one of these knives they carry around the ships; nearly all of the crew and everybody carries them. It looked like it was about eight or nine inches in length, or something like that; I didn't measure it. I just saw it at a glance.

Q. Do you recall what the color of the blade was?

A. No, I do not.

Q. Do you know whether it was the type of knife that is sharpened on both sides?

A. Yes, it was.

Q. Do you know whether it was pointed or not?

A. Yes, it was.

Q. In other words, it was a sort of a sheath type, double-edged blade, about nine inches long?

A. Yes.

Q. You are in charge of the mess room, are you not?

A. Yes.

Q. You are familiar with the type of knives that they have in there to clean crumbs off the table?

A. Yes (38).

Q. Did the mess men, in their occupation, use a similar knife to this?

A. No; they used ordinary table knives.

Q. Ordinary table knives; I presume sharp only on the one side?

A. Yes.

Q. Not pointed?

A. No, they are not pointed.

Q. Do you know, in your capacity as third steward, whether there is any use for this type of knife in Yates' possession in connection with his duty as a mess man?

A. No, there is not.

Q. Now, at that time, you saw Yates come out of the mess room, and then you saw him stab Olsen?

A. He must have stabbed him. Olsen left right after that, and there was blood dropping on the deck.

Q. Do you know how much time elapsed during this?

A. It was instantaneous; about five seconds.

Q. Did you or did you not see Olsen throw up his arms at any time?

A. I don't remember; I could not say.

Q. The next thing you know Olsen turned and ran, in what direction?

A. He ran what they call on the ship aft, toward his quarters.

Q. That would be down in this direction.

A. Yes.

Q. Down this way?

A. Yes.

Q. Did you have any conversation with Yates after Olsen ran away?

A. None whatsoever.

Q. You did not say anything to him?

A. No.

Q. Did you see what he did after that?

A. Yes; he went back in the mess room and went to work." (Tr. 38-42.)

His testimony was likewise unshaken on cross-examination (Tr. 42-45).

On redirect examination he stated that at the time he was stabbed Olsen was standing still and did not commence to run until after he was stabbed (Tr. 45).

ROLAND PICORD, junior engineer of the vessel, testified that he saw the affray in the passageway. He testified (Tr. 45-46) :

"The only thing I saw was when Mr. Olsen put up his hand and hollered, 'No, you don't', and started running, and I happened to turn around, and I seen Mr. Yates over there put a knife into a sheath. Mr. Collins was there at that time. The first thing I heard was Mr. Olsen go up to Collins and say to Collins, 'It's getting so a person has to fight for his meals'. Yates was not there at that time; I first saw Yates when I heard Mr. Olsen holler, 'No you don't'. I was standing sideways; I was not facing them at all. I could just see the heads of Olsen and Yates at the time. The next thing I saw was Olsen running, and then I saw him put his knife in a sheath; I saw Mr. Yates put a knife in a sheath. I did not get a good look at it, to tell you the truth, I don't know whether it was a leather sheath; then I saw Olsen running off, I did not see where Yates went after that." (Tr. 45-46.)

The appellant claimed that in the first affray in the mess hall Olsen struck him and tore his shirt. That

he went to the forecastle to change his shirt and as he was returning along the passageway saw Olsen and the Third Steward engaged in conversation. That he walked toward them and Olsen raised his hand at him (Tr. 50-51). That he had a plain knife out of the mess hall in his hand and that when Olsen raised his hand he "jabbed at him" (Tr. 53). That he only jabbed him once.

On cross-examination the appellant stated that he could not remember saying to Olsen as he walked toward him, "I'll kill you, you son-of-a-bitch" but that he would not say that he did not say it (Tr. 57).

JOHN R. DELORA, called for the defense, testified that he saw the affray in the passageway and that he saw the appellant jab only with a knife and that it was a common table knife (Tr. 60).

ROBERT A. BOLDUC testified that he was an officer of the United States Army assigned to the vessel and that he treated Olsen after the stabbing. He stated that Olsen had three incised wounds in the arm and one in the right chest wall. One wound was in the upper right arm just above the elbow on the under surface, one on the forearm on the upper surface just below the elbow, one near the wrist on the upper surface and one on the right chest wall underneath which was a bruise (Tr. 26-27).

**QUESTIONS.**

1. Did the Court err in not giving the requested instructions on simple assault?
  2. Did the Court err in its communications to the jury?
  3. Is the judgment of conviction void and a nullity?
- 

**ARGUMENT.****1. THE COURT DID NOT ERR IN REFUSING TO GIVE THE REQUESTED INSTRUCTIONS ON SIMPLE ASSAULT.**

The appellant's argument on this question is two-fold, first, that the evidence indicated that he acted in self-defense and, two, that as simple assault is an included offense in the statute under which he was charged, he was entitled as a matter of law to an instruction on simple assault.

The first argument is entirely without merit. Whether or not a defendant acts in self-defense has no bearing upon the degree of crime with which he may be charged under the statute or of which he may be found guilty. *If the appellant acted in self-defense he is not guilty of any crime at all.* The jury was fully instructed on the law of self-defense (Tr. 62-73) and determined as a matter of fact that he had not so acted. This finding cannot be attacked in this appeal as it is not contended that the evidence is insufficient to support the verdict.

The second argument is equally untenable. The statute under which the defendant was charged de-

scribes five distinct offenses, setting forth five degrees of crime which may arise from a single affray. These are (a) assault with intent to commit murder or rape, (b) assault with intent to commit any other felony, (c) assault with a deadly weapon with intent to do bodily harm, (d) battery, and (e) simple assault.

The appellant was charged in the indictment with assault with intent to kill and was found guilty of the lesser included offense of assault with a deadly weapon. The Court, after hearing the evidence, correctly refused to give instructions on the lesser offenses of battery and simple assault.

The facts show without contradiction, and the appellant himself admits, that he used a knife. A knife is a deadly weapon. It follows, therefore, that the only crimes under the statute of which the appellant could be guilty were assault with intent to kill or assault with a deadly weapon. The determining factor at this point was his intent. If it had been shown that he attacked Olsen with the knife with malice aforethought he would undoubtedly have been guilty of assault with intent to commit murder. The fact that the jury did not find such intent, does not change the factual situation that he did attack Olsen with a knife and that a knife is a deadly weapon. It became the duty of the Court, therefore, after having heard the evidence, to instruct the jury only upon the crimes of which he could have been found guilty, which it did.

Appellant's contention is unreasonable. If it was accepted it would follow that even in the most ag-

gravated case of assault with intent to kill by the use of a deadly weapon the Court would have to instruct the jury that the defendant could be guilty of merely a battery or even a simple assault. We respectfully submit that this is not the law.

*People v. Moon* (Cal.), 45 P. (2d) 384;  
*State v. Foley*, 25 P. (2d) 565, 174 Wash. 575;  
*State v. Gonzales* (Wyo.), 23 P. (2d) 354;  
*State v. Mowry*, 15 P. 282, 37 Kan. 369;  
*State v. Estep*, 24 P. 986, 44 Kan. 572;  
*State v. McGowan*, 93 P. 552, 36 Mont. 422;  
*State v. McDonald*, 149 P. 279, 51 Mont. 1;  
*State v. McPhail*, 81 P. 683, 39 Wash. 199;  
*State v. Coffman* (Or.), 136 P. (2d) 687.

---

## 2. THE COURT DID NOT ERR IN ITS COMMUNICATIONS TO THE JURY.

There were three written communications from the jury to the Court. The first of these was a request for the logbook of the vessel. The Court properly refused to send it to the jury for the reason that the entire logbook had not been introduced into evidence. It was introduced by the Government for the limited purpose of showing that the voyage took place (Tr. 25). Counsel for the appellant and for the Government were advised of this request and counsel for the appellant objected to the log being sent to the jury. Both counsel for the Government and the Court agreed that this objection was sound. Counsel for the appellant knew that the Court informed the jury that

their request was denied ('Tr. 88). It is immaterial whether or not appellant's counsel told the appellant of this ruling. It was not necessary that the appellant himself be present inasmuch as the Court had not given an instruction but merely a directive to the jury that certain evidence which they wished to consider was not admissible.

There can be no error in connection with the second communication inasmuch as it was a request for further instructions and the Court properly brought the jury into the courtroom and re-read the requested instructions. The appellant and his counsel were present in the courtroom when these instructions were given and no objection was made or exception taken ('Tr. 90). This was the orderly and proper procedure to be followed.

The third communication was not error. The jury had not made a request for further instructions on the law, and the Court gave no instructions. When the jury retired at the close of the case they were furnished with certain forms of verdict and they were properly instructed upon their use (Tr. 73). From the only evidence which is available in the record, it would appear that the jury asked the Court if they could return a verdict different from those with which they were supplied. The Court, having supplied them with proper verdicts in accordance with the evidence and the instructions, properly informed the jury that they must return a verdict upon the forms which were given to them. Here, again, this was not an instruction but a directive.

There is no contention that the bailiff, as the Court's messenger, gave the jury any information other than that. The verdicts which were given we must assume to have been proper in accordance with the evidence. The appellant apparently overlooks the fact that among the forms of verdict was a verdict of not guilty.

*Outlaw v. U. S.* (C.C.A. Tex.), 81 F. (2d) 805, cert. den. 56 S. Ct. 747, 298 U. S. 665, 80 L. Ed. 1389;

*Dwyer v. U. S.*, 17 F. (2d) 696, cert. den. 47 S. Ct. 767, 274 U. S. 756, 71 L. Ed. 1336;

*U. S. v. McGuire*, 64 F. (2d) 485, cert. den. 54 S. Ct. 63, 290 U. S. 645, 78 L. Ed. 560;

*Valdez v. U. S.*, 244 U. S. 432;

*Rumley v. U. S.*, 293 F. 532;

*State v. Haines*, 15 S. E. 555;

*Goode v. State*, 152 So. 266.

We respectfully submit that nothing new or additional was submitted to the jury for its consideration and, even if the third communication, by the bailiff, was irregular, no harm was done to the defendant and he was not prejudiced.

See dissenting opinion of Justice Wilbur in *Ah Fook Chang v. United States*, 91 F. (2d) 805, also: *Miller v. U. S.* (C.C.A.-9), 4 F. (2d) 384; *People v. Morales*, 60 Cal. App. 196.

**3. THE JUDGMENT OF CONVICTION IS NOT VOID  
OR A NULLITY.**

It is not essential that the formal words "as charged" be used in the verdict.

It is not essential that the verdict recite the intent of the defendant or that he acted without just cause or excuse.

*U. S. v. Walsh*, 22 F. 644;  
*Grock v. U. S.*, 289 F. 544, 53 App. D. C. 146;  
*Phillips v. U. S.*, 264 F. 657, cert. den. 40 S. Ct. 584, 253 U. S. 491, 64 L. Ed. 1028;  
*Gozner v. U. S.*, 9 F. (2d) 603;  
*Mattingly v. U. S.*, Fed. Cases No. 9295;  
*Chadwick v. U. S.*, 117 F. (2d) 902, cert. den. 61 S. Ct. 1109, 313 U. S. 585, 85 L. Ed. 1541.

---

**CONCLUSION.**

We respectfully submit that no prejudicial error was committed and that the judgment should be affirmed.

Dated, San Francisco,  
September 26, 1945.

FRANK J. HENNESSY,  
United States Attorney,  
JAMES T. DAVIS,  
Assistant United States Attorney,  
*Attorneys for Appellee.*

No. 10974

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

E. J. HEBETS,

Appellant,

vs.

BENSON G. SCOTT,

Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the District of Arizona

FILED

MAR 15 1945

PAUL P. O'BRIEN,  
CLERK



No. 10974

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

E. J. HEBETS,

Appellant,

vs.

BENSON G. SCOTT,

Appellee.

---

Transcript of Record

---

Upon Appeal from the District Court of the United States  
for the District of Arizona



## INDEX

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Complaint .....	6
Answer .....	9
<b>Appeal:</b>	
Bond on .....	62
Clerk's Certificate to Transcript of Record on .....	67
Designation of Contents of Record on (DC) .....	65
Designation of Record on (CCA) .....	70
Notice of .....	61
Statement Adopting Statement of Point on Which Plaintiff and Appellant Intends to Rely on (CCA) .....	69
Statement of Point on Which Plaintiff and Appellant Intends to Rely on (DC) ....	64
Stipulation of Parts of Record to be In- cluded in Record on (DC) .....	66
Bond on Appeal .....	62
Certificate of Clerk to Transcript of Record on Appeal .....	67
Designation of Contents of Record on Appeal (DC) .....	65

<b>Index</b>	<b>Page</b>
Designation of Record on Appeal (CCA).....	70
Findings of Fact and Conclusion of Law.....	58
Judgment .....	60
Minute Orders:	
May 22, 1944—Granting Motion to Produce Documents .....	56
October 16, 1944—Denying Motion for Summary Judgment .....	56
October 18, 1944—Vacating Order Denying Defendant's Motion for Summary Judg- ment .....	57
November 27, 1944—Submitting and Tak- ing Under Advisement, Defendant's Mo- tion for Summary Judgment .....	57
December 11, 1944—Granting Defendant's Motion for Summary Judgment .....	58
December 21, 1944—Approving and Filing Defendant's Findings of Fact and Con- clusions of Law and Approving and Fil- ing Judgment .....	60
Motion for Summary Judgment .....	12
Documents:	
Nos. 1 to 43, inclusive.....	14-54
Names and Addresses of Attorneys of Record ..	1
Notice of Appeal .....	61

<b>Index</b>	<b>Page</b>
Order of Removal .....	4
Petition for Removal .....	2
Statement Adopting Statement of Point on Which Plaintiff and Appellant Intends to Rely on Appeal (CCA) .....	69
Statement of Point on Which Plaintiff and Ap- pellant Intends to Rely on Appeal (DC)....	64
Stipulation of Parts of Record to be Included in Record on Appeal (DC).....	66
Stipulation re Documents attached to Motion for Summray Judgment.....	55



**ATTORNEYS OF RECORD**

**HILL, ROBERT AND HILL**

405 Luhrs Tower,  
Phoenix, Arizona.

Attorneys for Appellant.

**BLAINE B. SHIMMELL, Esquire,**

317 Title and Trust Building,  
Phoenix, Arizona.

Attorneys for Appellee. [3]

---

\*Page numbering appearing at foot of page of original certified  
Transcript of Record.

In the Superior Court of the State of Arizona

In and for the County of Maricopa

No. 52767—Div. 3

E. J. HEBETS,

Plaintiff,

vs.

BENSON G. SCOTT,

Defendant.

**PETITION FOR REMOVAL**

To the Superior Court in and for Maricopa County,  
Arizona:

Your petitioner, Benson G. Scott, appearing specially and for the sole purpose of filing and presenting this, his petition for removal, respectfully represents and shows the Court:

**I.**

That the above-entitled suit, of a civil nature, of which District Courts of the United States have original jurisdiction, was brought, and is now pending, in the above-entitled court; that the matters and amount in dispute therein exceed, exclusive of interest and costs, the sum or value of \$3,000.00; and that the time within which defendant above named may appear and answer or defend the same, as provided by the laws of the State of Arizona and the rules of this Court, has not expired.

**II.**

That petitioner, sole defendant in this suit, was,

when this suit was commenced, ever since has been, and still is, a citizen and resident of the State of California and not a citizen or resident of the State of Arizona; and that plaintiff was, when this suit was commenced, ever since has been, and now is, a citizen and resident of the State of Arizona.

### III.

Petitioner represents that, by reason of the foregoing facts, he, as sole defendant in this suit, is entitled, [4] and desires, to have this suit removed from the Superior Court of the State of Arizona, in and for the County of Maricopa, to the District Court of the United States for the District of Arizona, and, accordingly, herewith presents his bond in the penal sum of \$1,000.00, with good and sufficient surety, for his entering, in said District Court of the United States, within the time required by law, a certified copy of the record in this suit, and for payment of all costs that may be awarded by said District Court, if said Court shall hold that this suit was wrongfully and improperly removed thereto.

Wherefore, petitioner prays that this Honorable Court proceed no further herein, except to make the Order of Removal required by law, accept and approve the said bond, and cause the record herein to be removed to the District Court of the United States for the District of Arizona, at Phoenix, Arizona.

BLAINE B. SHIMMEL

Attorney for Defendant Petitioner.

State of California,  
County of San Diego—ss.

Benson G. Scott, being first duly sworn, on oath deposes and says:

That he is the sole defendant in the above-entitled cause, and named in the foregoing petition; that he has read said petition, knows the contents thereof, and that the allegations therein contained are true.

**BENSON G. SCOTT**

Subscribed and sworn to before me this 6th day of March, 1944.

(Notarial Seal) **I. YASINSKI**

Notary Public in and for the County of San Diego,  
State of California.

My Commission Expires: Oct. 2, 1944. [5]

Copy received and service acknowledged this 20  
day of March, 1944.

**HILL, ROBERT & HILL**  
Attorney for Plaintiff.

[Endorsed]: No. 52767. Filed Mar. 20, 1944.

[Endorsed]: Filed Apr. 15, 1944.

---

**[Title of Superior Court and Cause.]**

**ORDER OF REMOVAL**

Benson G. Scott, sole defendant in the above-entitled cause, having filed herein his petition for an order removing this cause to the District Court

of the United States for the District of Arizona, together with his bond on such removal, and notice of the filing and hearing of said petition; and it appearing to this Court that said petition is in due form, and filed with the required time, and that said bond is conditioned as provided by law;

And it appearing that the notice required by law, of the filing of said petition and bond, has been duly served upon plaintiff herein; and it further appearing to this Court that this is a proper cause for removal to said District Court of the United States; this Court does now hereby accept and approve said bond; and

It Is Ordered, That the above-entitled cause be, and the same is hereby, removed to the District Court of the United States for the District of Arizona; that all other proceedings of this Court herein be stayed; and that the Clerk of this Court is hereby directed to make up the record in this cause for transmission to said District Court forthwith.

Dated this 21st day of March, 1944.

HAROLD R. SCOVILLE  
Judge.

[Endorsed]: Filed Mar. 21, 1944. [7]

[Endorsed]: Filed Apr. 15, 1944, Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gertrude I. Bitting, Deputy Clerk.

In the District Court of the United States  
for the District of Arizona

No. Civ. 546—Phx.

E. J. HEBETS,

Plaintiff,

vs.

BENSON G. SCOTT,

Defendant.

AMENDED COMPLAINT

Comes Now plaintiff and for cause of action  
against defendant alleges that:

I.

At all times herein mentioned plaintiff was and  
now is a duly licensed real estate broker and en-  
gaged in the real estate business in the City of  
Phoenix, Maricopa County, State of Arizona.

II.

On or about June 1, 1943, plaintiff was employed  
by defendant to procur a purchaser for real estate  
owned by the defendant, which said real estate is  
in Maricopa County, State of Arizona, and de-  
scribed as follows:

The E $\frac{1}{2}$  of the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of the  
NW $\frac{1}{4}$  and the S $\frac{1}{2}$  of the NE $\frac{1}{4}$  and the SE $\frac{1}{4}$   
of Section 31, Township 2N. Range 2E., G. &  
S. R. B. & M.

**III.**

In consideration thereof defendant promised and agreed to pay plaintiff for his services a commission of five per cent (5%) on the sale price thereof.

**IV.**

A memorandum of such promise and agreement upon which this action is brought was in writing and signed by the said defendant. [9]

**V.**

On or about the 20th day of September, 1943, plaintiff negotiated the sale of said land belonging to the defendant upon the terms and conditions fixed and agreed upon by the defendant for the sum of One Hundred Eight Thousand and No/100 (\$108,000.00) Dollars. The purchase procurred by the plaintiff for the defendant's aforesaid land was then and there willing, ready and able to complete the purchase of defendant's real estate upon the terms and conditions fixed and agreed upon by the defendant with the plaintiff.

**VI.**

That plaintiff has duly performed all the conditions of said contract on his part to be performed.

**VII.**

Defendant has not paid the plaintiff the said commission or any part thereof, and there is now due and unpaid to plaintiff from the defendant the sum of Five Thousand Four Hundred and No/100 (\$5,400.00) Dollars.

Wherefore, plaintiff prays judgment against defendant for the sum of Five Thousand Four Hundred and No/100 (\$5,400.00) Dollars, and for costs of suit.

HILL, ROBERT & HILL  
By ROULAND W. HILL  
Attorneys for Plaintiff

### SECOND CAUSE OF ACTION

For a further and second cause of action against defendant, plaintiff alleges that:

#### I.

Paragraph I of the first cause of action is hereby referred to and made a part hereof.

#### II.

On or about the 20th day of September, 1943, the plaintiff performed services for the defendant at his request [10] as a real estate broker in Maricopa County, Arizona, in the negotiation of a sale of the following real estate located in Maricopa County, Arizona, to-wit:

The E $\frac{1}{2}$  of the SW $\frac{1}{4}$  and the SE $\frac{1}{4}$  of the NW $\frac{1}{4}$  and the S $\frac{1}{2}$  of the NE $\frac{1}{4}$  and the SE $\frac{1}{4}$  of Section 31, Township 2N. Range 2E., G. & S. R. B. & M.

Plaintiff procurred for the benefit of the defendant a purchaser ready, willing and able to purchase defendant's real estate upon the terms and conditions fixed and agreed upon by the defendant with the plaintiff for the sum of One Hundred Eight Thousand and No/100 (\$108,000.00) Dollars.

**III.**

Such services were reasonably worth the sum of Five Thousand Four Hundred and No/100 (\$5,400.00) Dollars.

**IV.**

Defendant has not paid said sum or any part thereof.

Wherefore, plaintiff prays judgment against the defendant for the sum of Five Thousand Four Hundred and No/100 (\$5,400.00) Dollars, and for costs of suit.

**HILL, ROBERT & HILL**

**By ROULAND W. HILL**

Attorneys for Plaintiff.

Received a copy of the foregoing amended complaint this 29th day of April, 1944.

**BLAINE S. SHIMMEL AC**

Attorney for Defendant.

[Endorsed]: Filed May 1, 1944. [11]

---

[Title of District Court and Cause.]

**ANSWER**

For his answer to the first cause of action contained in plaintiff's amended complaint, defendant admits, denies and alleges, as follows:

**I.**

Admits the allegations of Paragraph I.

## II.

Denies that plaintiff was employed by defendant as alleged in Paragraph II or otherwise.

## III.

Denies that this defendant promised and agreed to pay plaintiff a commission, as alleged in Paragraph III or otherwise.

## IV.

Denies that a memorandum of any such promise or agreement was or is in writing or signed by this defendant.

## V.

Denies that on or about September 20, 1943, plaintiff negotiated the sale of any land belonging to this defendant, as alleged in Paragraph V or otherwise; denies that plaintiff ever procured a purchaser for defendant's land, as alleged in Paragraph V or otherwise, and denies that there was an agreement between plaintiff and defendant in respect of defendant's land. [12]

## VI.

Answering Paragraph VI, defendant denies the existence of any contract between plaintiff and defendant.

## VII.

Answering Paragraph VII, defendant admits that he has not paid plaintiff the commission alleged in said amended complaint, or any part thereof; denies that he owes plaintiff Five Thousand Four Hundred (\$5,400.00) Dollars, or any amount.

For his answer to the second cause of action, contained in plaintiff's amended complaint, defendant admits, denies and alleges, as follows:

### I.

Answering Paragraph I, admits the allegations of Paragraph I of plaintiff's first cause of action.

### II.

Denies that plaintiff, on or about September 20, 1943, or at any time, performed services for this defendant at his request, as alleged in Paragraph II or otherwise. Denies that he ever entered into any agreement with plaintiff, as alleged in Paragraph II or otherwise.

### III.

Denies that any services performed by plaintiff were reasonably worth Five Thousand Four Hundred (\$5,400.00) Dollars, or any amount.

### IV.

Admits that he has not paid plaintiff Five Thousand Four Hundred (\$5,400.00) Dollars, or any part thereof.

### V.

Alleges that no memorandum of the alleged promise or agreement, upon which plaintiff's second cause of action [13] is brought, was ever in writing, signed by this defendant.

Wherefore, having fully answered, defendant prays that plaintiff's amended complaint be dismissed, and for his costs herein.

BLAINE B. SHIMMEL  
Attorney for Defendant.

Copy received and service acknowledged this 8th day of May, 1944.

HILL, ROBERT & HILL  
Attorney for Plaintiff.

[Endorsed]: Filed May 8, 1944. [14]

---

[Title of District Court and Cause.]

**MOTION FOR SUMMARY JUDGMENT**

Comes now defendant and, pursuant to Rule 56, moves the Court for a summary judgment dismissing plaintiff's amended complaint, upon the grounds:

1. That the claim, asserted in and by plaintiff's amended complaint, is for a commission, or the reasonable value of plaintiff's services as a broker, upon the sale of defendant's real estate; it being alleged (in Paragraph IV) and denied in defendant's answer that a memorandum of the promise, upon which the action is brought, was in writing, signed by defendant, as required by the provisions of Section 58-101 A.C.A. 1939.

2. That the existence of such a memorandum in writing, signed by defendant, is a material fact, necessary to be proved by plaintiff.

3. That pursuant to the respective motions of plaintiff and defendant, under Rule 34, and the orders made and entered herein on May 22, 1944, plaintiff and defendant have each produced for inspection and copy by the other all letters, telegrams, and other writings, written or received by them from the other in the premises, which writings necessarily constitute or contain all the evidence relied upon by plaintiff, of a memorandum in writing, signed by defendant, of the promise or agreement alleged in plaintiff's amended complaint. A full, true [15] and correct copy of said documents, numbered 1 to 43 inclusive, is hereto attached and made a part of this motion.

4. That said writings show that there is no genuine issue as to the material fact of the existence of the memorandum in writing, required to be proved by plaintiff, and that defendant is entitled to a judgment of dismissal of plaintiff's amended complaint, as a matter of law.

Dated this 26 day of June, 1944.

**BLAINE B. SHIMMEL**

Attorney for Defendant. [16]

## DOCUMENT No. 1

January 8, 1942

Mr. Benson G. Scott,  
1306 Sixth Street  
Coronado, California

Dear Mr. Scott:

Since writing you on October 27th, I have not heard from you regarding the 360 acres of land here in Section 31, Township Two North, Range Two East.

If this land is for sale, we would like very much to have a listing on it.

Yours truly,

FARM & HOME INVESTMENT  
CO.

Per W. J. McNAMARA

WJM:mb [17]

## DOCUMENT No. 2

February 2, 1942

Mr. Benson G. Scott,  
1306 Sixth St.,  
Coronada, Calif.

Dear Mr. Scott:

You mentioned in your letter that you expected to be in Phoenix and I have been expecting to see you in the office, but evidently you didn't get a chance to come over.

I have a party who is interested in the place and he asked me to write you and see if you would consider taking two 40's in on trade, or if not, if

you would consider selling 160 acres of it and at what price. This man would like to have the whole thing if he could trade the two 40's in on it. They are both well located and in good shape to rent or sell.

Please let me hear from you as soon as possible.

Very truly yours,

E. J. HEBETS,

Realtor, Farm & Home Investment Co. [18]

### DOCUMENT No. 3

Benson G. Scott  
1306 Sixth Street  
Coronado, California

Feb. 4, 1942

My dear Mr. Hebets:

My apologies for not seeing you. I was in Phoenix for a couple of days in December but was so busy that I failed to get everything done.

Perhaps you have the wrong impression of this property. I am not trying to sell it. I certainly would not be interested in taking two small pieces unless I could get them for less than their market value.

This is a good ranch and a property involving considerable money. If you have a buyer definitely interested and willing to pay the market price for it, let me have an offer that is a business one. I would not consider cutting the piece unless I were offered a substantial premium.

Yours truly,

B. G. SCOTT [19]

## DOCUMENT No. 4

February 10, 1942

Mr. Benson G. Scott,  
1306 Sixth St.,  
Coronado, Calif.

Dear Mr. Scott:

I have your letter of Feb. 4th, and I am very sorry that you didn't find time to drop in and see me when you were in Phoenix. However, I think I understand your position, Mr. Scott. I thought perhaps you might be interested in disposing of it from the stand point that it has been pretty heavily farmed for a number of years and will soon have to be put back to alfalfa.

Of course it is difficult to do very much without a price base to work from. In considering it from the stand point of market value, there are several factors that enter into it, one of which is the fertility or condition of the soil. I would say that the market value on your acreage would be between \$175 and \$200 per acre, and I think if we could get together with my man on a deal that he would turn his two 40's in, acre for acre at the value placed on yours. Although the smaller blocks of land will sell at a higher price per acre. His two 40's are well located and I think one of them would sell for about \$8,500 and one about \$9,000. They are both in good fertility and would rent for about \$27.50 or \$30 per acre.

I would appreciate hearing from you further,

Mr. Scott, and thanking you for your prompt response to my last letter, I am

Very truly yours,

E. J. HEBETS,

Realtor, Farm & Home In-  
ment Co. [20]

DOCUMENT No. 5

Benson G. Scott  
1306 Sixth Street  
Coronado, California

Feb. 16, 1942

Mr. Hebets:

This will acknowledge yours of the 10th.

I shall be over soon; at which time I will look you up. In the meantime if you have a deal that you think will interest me, let me know.

However, as the picture looks at this time I won't consider anything less than two hundred net. So unless you have a buyer that wants to pay a good price don't waste time on this deal.

The best way to get me to sell is to offer me another piece that I can profitably buy. I am willing to trade at any time.

Yours,

SCOTT [21]

## DOCUMENT No. 6

March 26, 1942

Mr. Benson G. Scott,  
1306 Sixth Street,  
Coronado, Calif.

Dear Mr. Scott:

I didn't answer your last letter, as I thought perhaps you might be over soon. However, we have an eastern buyer in here now looking for a piece of land about the size of yours. I have not shown it to him yet, as I would like to have more definite information from you.

I talked to Mr. Smith today, to see if I could find out how much he was paying on his lease. I told him I had written you about the place and that you didn't seem to be very much interested in whether you sold it or not, but I had a man looking for an investment, who might possibly be interested in it, and he advises me that he is dealing with you on it himself and that he has an option to buy it. Will you please advise me what the status is? Does he have an option at a certain price and terms, or does he have an option to match any offer that you might get on it?

The market is a little better here now and there is a possibility that we might be able to get \$225 per acre for it. However, we would have to be assured that in the event we forced a sale to Smith to match our offer that we would be paid our 5% commission.

Mr. Smith advises me that he is paying about

\$25 per acre. Will you clarify this for me and give me the expiration of the lease?

Thanking you for an early reply, I am

Very truly yours,

FARM & HOME INVESTMENT  
CO.,

E. J. HEBETS,  
Realtor. [22]

DOCUMENT No. 7

Benson G. Scott  
1306 Sixth Street  
Coronado, California

March 27, '42

Farm & Home Investment Co.

Phoenix, Arizona

Gentlemen:

B. G. Scott left here to day for Phoenix. You can contact him by leaving a note with Western Union in Phoenix.

Truly—

O. E. SCOTT  
O. E. Scott [23]

DOCUMENT No. 8

June 15th, 1942

Mr. Benson S. Scott,  
1306 Sixth Street,  
Coronado, California

Dear Mr. Scott:

I was out by your place the other day and stopped

to see Mr. Smith on your place. He has the place in fine shape now, by the way.

I used up quite a bit of time looking for places when Mitchell was with the Western Farm Management at the same time you were with them. At that time I had an office at 17 South Central in with the Morris Plan, and when it went on the rocks, I moved up with the Mutual Life in the offices the Western formerly were in. For the past two years I was with the post office, but resigned the first of June to go back into the real estate business and am now with the above firm.

We have a good 160 acre tract with a good ranch house and one tenant house. Pressure water in one house and good well with the other place. This land can be bought for \$215. per acre and can be rented for \$25. per acre with water being paid by tenant. This land is west and north from your place and has "A" water right and will show good interest on investment and can be sold on terms if desired.

Kindly let me know if you would be interested.  
With best regards, I remain

Sincerely yours

H. I. MORSE

141 West Monroe

Phoenix, Arizona [24]

DOCUMENT No. 9

Copy of  
Western Union Telegram

Benson G. Scott,  
R. #4, Box 321,  
**Visalia, Calif.**

Have offer \$90,000 cash for your 360 acres. Wire  
or phone me collect.

E. J. HEBETS

Farm & Home Investment Co.  
141 W. Monroe  
Phone 4-4189 [25]

DOCUMENT No. 10

Copy of  
Western Union Telegram

Benson G. Scott  
1306 Sixth St.,  
Coronado, Calif.

Have offer \$90,000 cash for your 360 acres. Wire  
or phone me collect.

E. J. HEBETS

Farm & Home Investment Co.  
141 W. Monroe [26]

## DOCUMENT No. 11

Western Union

DBE 200 18 NL Collect—Visalia Calif

12 1943 Mar 12 PM 10 07

E. J. HEBETS

141 West Monroe

Phoenix, Arizona

Thanks for the offer. Not enough now. Will be over the first of April. See you then.

B. G. SCOTT [27]

## DOCUMENT No. 12

March 13, 1943

Mr. Benson G. Scott,  
R. #4, Box 321,  
Visalia, Calif.

Dear Mr. Scott:

I have your wire this morning in answer to my offer.

I can readily appreciate your position in this, Mr. Scott, in as much as you are not offering the property for sale and you may have more foresight than I have in turning this offer down. However, at this time, \$250 per acre is right up against the ceiling. There isn't anything selling for that kind of a price except improved 40 or 80 acre tracts. I know, of course, that this doesn't matter to you, Mr. Scott, whether we do any work on it or not. However, I think you can see our point of view too. If you consistently put your price above what the market will pay, there isn't much percentage in us trying to sell it.

These buyers are few and far between for acreage that large and it won't be possible for me to hold him until the first of April. I will try to hold him long enough to get a reply back by letter. I would like to have you reconsider and write me by "Air Mail."

As near as I can determine from talking to the man, his offer is as high as he expects to go. In fact, he wanted to make an offer of \$235, but I talked him out of it. However, I would like to have a definite expression from you in the event there is any possibility of him doing any better.

Thanking you for a prompt reply, I am

Very truly yours,

FARM & HOME INVESTMENT  
CO.

E. J. HEBETS,  
Realtor [28]

DOCUMENT No. 13

Copy of  
Western Union Telegram

Phoeniz, Arizona  
April 7, 1943

Benson G. Scott,  
Box 312, R. #4,  
Visalia, Calif.

Your wire of March 12th, stated you would be in Phoenix April 1. I have not seen or had any reply to air mail letter of March 13. Think buyer

still available. Would like definite price for at least 10 days.

E. J. HEBETS,  
Realtor,  
Farm & Home Investment Co.  
141 W. Monroe St.,  
Phoenix, Arizona [29]

#### DOCUMENT No. 14

Mr. Benson G. Scott,  
R. #4, Box 321,  
Visalia, Calif.

Dear Mr. Scott:

I have just secured a listing on a ranch that might possibly be of interest to you, since you are inclined toward the larger ranches.

This ranch, I think is without question the best ranch in the Salt River Valley. It consists of 800 acres in one block and is exceptionally well improved. It was operated as a cattle ranch during the lifetime of the original owner and until his heirs took it over. It is fenced with woven wire and cement posts and has several buildings on it in addition to corrals, silos, etc. It also has an old "A" water right in addition to two large supplemental irrigation wells.

The price of this ranch is \$320,000, which you will note is \$400 per acre and definitely not a sacrifice price, but in proportion to improvements and location, etc., it is considerably cheaper at \$400 per acre than yours ranch at \$300. This property

hasn't openly been put on the market yet. I am just making individual contact.

If you are interested, let me hear from you.

Very truly yours,

FARM & HOME INVESTMENT  
CO.

E. J. HEBETS,  
Realtor. [30]

DOCUMENT No. 15

Benson Scott  
Bisalia  
May 31

My dear Hebets:

Your letter about an 800 acre place came this afternoon.

While this is too high a deal for me I am always interested in a high grade property. If the price should get down to sound investment values, I don't believe there is, with a couple of exceptions, a ranch in the Valley that is worth \$400.00 an acre at this time, let me know. "I might be able to work out a combination deal on it, that is, if you sell my other place."

In going over in my mind the places this might be I have come to the conclusion that this is that ranch at Cashion, south side of the Buckeye road. If so it is over priced, but a good ranch. If it is another one, let me know what you are talking about, to be held in confidence of course.

My best regard to you and Morse,  
Sincerely,

B. G. SCOTT

Rte. 4, Box 321

Visalia, Calif. [31]

DOCUMENT No. 16

June 3, 1943

Mr. B. G. Scott,  
Route #4 Box 321,  
Visalia, California.

Dear friend Scott:

Saw your letter to Hebets. You are a very good guesser. I have not been all over the ranch, but they say there are a lot of good improvements on the place, such as barns, sheds, cattle feed lots and from all reports it all well fenced. Hebets and I are planning to drive down just as soon as we can get a breathing spell. His second son left for the Army tonight and this with all the other things, such as moving, he moved Sunday and Monday, has kept him busy.

Since you left, I have sold 32 acres, 65 acres, 40 acres, 20 acres, and a five acre tract. I have two good prospects for your place and thought I had better write you as to lease and if you still wanted only 30% down. Presume you can soon estimate your income bracket and can be governed accordingly. Andrew Hawkins is interested in buying a large tract and Cecil Miller would like to work out a deal of some sort if he can avoid too much income tax from sale of his quarter-section on

Yuma Road. Also have another lettuce grower interested that could pay 30% or better down.

Am sure counting on making this sale in near future, but would appreciate any help you can give as to lease etc. We do not allow any one to go on the place or bother Leo. Let me hear from you at once. Thanks a lot.

Sincerely yours,  
H. I. MORSE [32]

## DOCUMENT No. 17

June 12th, 1943

Mr. B. G. Scott,  
Route 4, Box 321,  
Visalia, California

Dear friend Scott:

Leo just called me and said that he had received a letter from you and that the impression he got was that you did not care to sell the place. However, he said that he would bid against any one that made an offer of the place. He stated that he had some of the money in the bank and could get the rest of if he decided to buy it, and he felt that it was only fair to tell me that he was going to try it buy it direct from you and resell what he did not wish to keep and that in this way he could handle it.

It was just this set-up that I was afraid of from the beginning. As long as he had no competition he would not make an offer any where near what we put up to you, but as soon as he finds others

will give \$300 per acre he will do so rather than give up the place. Not that I blame him, but he has had mighty reasonable rent all along, somewhat lower than most tenants even with the amount he has been keeping in alfalfa. I understand that the Dr. Perkins quarter on 20 and Christy is rented to Arena Norton for \$25 per acre for three years and to be kept in alfalfa.

Leo also told me that he didn't believe that land was worth \$300 per acre, but it was just like buying a suit of clothes, "if you wanted it you would buy it even though you knew you were paying too much" at the time. So you can see my position in the matter. When you were over here, I knew that we could sell the place if it could be sold, but we felt that giving Leo the chance to bid against any offer we submitted made [33] it tough on us. Leo expects to make the offer less the commission and then sell part some part of it off. I was in hopes you would not mention who was bidding on the place since it gives him a good opportunity to talk them out of it, since most of the neighbors do not care to bid against a \$5000 handicap. He said that he would write you the first of the week, so I am writing you ahead of his letter in order that you know his intentions, and leave it up to your sense of fairness. As I see it Leo would never have bought the place except to keep some one else from getting it. I am still willing to put up my \$100 that I will sell it between now and July 1st even subject to the one year lease. I know it can be done, but

it would be a lot easier if possession could have been given.

Shall appreciate hearing from you as soon as possible.

Sincerely yours,

..... [34]

### DOCUMENT No. 18

Copy of  
Western Union Telegram

B. G. Scott  
PH 1366M  
Visalia, Calif.

Have received no letter as yet. Have two prospects very interested in place and am awaiting letter.

H. I. MORSE  
141 W. Monroe  
Phoenix, Arizona [35]

### DOCUMENT No. 19

Benson Scott  
1306 Sixth Street  
Coronado, California  
Visalia, July 7th.

Dear Morse:

Found your wire waiting for me when I came in last night. I had to go north just after I talked to you last time and in the press of other matters I let the letter to you be put off from day to day,—with the usual result,—a long delay.

I dont know just what you want me to say in this

letter, now that I am writing it. You understand the setup. Leo has a lease until next July. While he has been told by me that he could have the first chance to buy he told me when I was over that the price had gone too high for him. He has never told me anything else. So far as I know that stands.

While I wrote the above I realized that that is not the statement you want. I guess I had better have a written statement from Leo, if I can get one. I will write him today. I am reasonably sure of the answer he will give me but before we try to close a deal I had better have a clear understanding from him. You understand that there is nothing more than a moral obligation on my part, I have assured Leo that I would take care of him should I sell. If a buyer would want to give him a long term lease, three or five years, that would satisfy him I am sure. He would much rather lease than buy.

In the meantime just let the deal simmer. I repeat, what I told you in Phoenix, that you are the only broker who will be allowed to do anything on it. If I decide to put it in anyone else's hands I shall give you ample time to work out anything you may have in mind. At this time you are the only firm [36] who knows I would consider selling at all.

There is this angle. I am not raising the price on the place at this time, but, six months from now the picture may be quite different. Price changes are moving very rapidly just now. But I know you understand that angle.

If you should develop something that is a deal

shoot me a letter on it. I will do my best to work it out for you. I will give you a letter as soon as I have an answer from Leo.

Yours,  
SCOTT [37]

## DOCUMENT No. 20

July 10th, 1943

Dear friend Scott:

Received your letter this morning and hope that we will able to work out something in near future.

I have two and probably three good prospects for your place—as I wrote you before. Andrew and George Hawkins are very definitely interested in the place. However, after you wrote Leo, he called up Andrew and rather took him to task for trying to buy the place from under him and told Hawkins that he had made you an offer of \$300 per acre (without commission of course) and that he intended to buy the place, but that you refused his offer. Hawkins does not wish to antagonize Leo, but he would consider giving the \$300 per acre with immediate possession and may even consider it subject to the one year lease, but he will have to sell about \$30,000 worth of cattle or trade them to you or else dispose of another ranch he has already had an offer on. For this reason he prefers to know definitely that we can deliver it to him at same price Leo would get it.

I realize your position with Leo, but I do not feel that you are under any obligations to sell to him for any less than to any one else, and you know

that he did not intend to buy the place at present prices if he can continue to lease it from you at such favorable terms. However, I think that he will wiggle around and get financed rather than give up the place. He would not be willing to lease the place at any higher rate than he is paying you if we sold it, but he came right out and told me definitely that he would buy the place himself before he would give it up and that he had the money in the bank to do so.

I appreciate your kindness to us in not putting the place in other brokers hands and I know that you are very fair [38] minded. However, the fact remains if the place is sold for \$300 per acre it will be due to our efforts in a large measure and I think that we have come nearer earning the commission than Leo has.

I am still willing to put up \$100 that I can sell it within 30 days from time you give us a definite commitment. Leo does not have any advantage over our buyers and we will either force him to buy or sell it to one of three buyers we have on the string now. The lease is a big handicap, but it is probable that we can over come this with two of the buyers. At any rate I am willing to take the chance. So will appreciate a letter to the effect that we can deliver it for \$108,000. subject only this one year's lease.

Hope that this will give you the idea of what we are up against and we will hear from you as soon

as convenient, so we will have something definite to work on. With kindest regards, I remain,

Sincerely yours,

..... [39]

### DOCUMENT No. 21

August 10, 1943

Mr. Benson G. Scott  
Rt. 4, Box 321  
Visalia, California

Dear Scott:

Haven't heard from you since July 7th and have been looking for a letter telling how you came out with Leo.

I had Mr. E. H. Kendall out by the place this morning and he is very much interested in the place.

Mr. Kendall is president of the Arrow Transportation Co. of Richmond Highlands in Seattle, Washington. He recently bought the old Bennett place at 126 Country Club Drive. He also has just purchased the 40 acres running from Central Avenue to 7th Street on Missouri Avenue.

He is disposing of his \$40,000 home in Seattle and is going to purchase more land here. Said your place appealed to him more than anything he had seen. He is willing to take it subject to lease or subject to possession at expiration of lease, with some adjustments, if he buys it.

Kendall is now waiting to hear from his wife as to when she will be down. Said he would prefer to hear from her as to whether she had consummated sale of home in Seattle before putting up deposit

but, that he was definitely interested and would like for me to give him a little time for further investigation and said if you cared to investigate his financial standing you were welcome to do so. Most of his business dealings have been with the Standard Oil Company up and down the coast for past 20 years.

I really think we have a good chance of making a deal with him within the next 30 days. He could pay 30% now and balance over period of 5 to 10 years as you preferred. It is his [40] intention to put all the place in alfalfa as soon as he gets possession and would try to make it one of the "show places" in the valley.

Let me hear from you as soon as you can as I want to keep on his trail until he buys. He borrowed my soil map and crop reports and will be in the office again in a few days. I told him not to bother Leo since I could give him all the information as to lease and crops to be planted as soon as I could hear from you.

Sincerely yours,  
H. I. MORSE

HIM:je [41]

## DOCUMENT No. 22

Copy of  
Western Union Telegram  
Phoenix, Ariz.  
August 20, 1943

B. G. Scott  
Rt. 4, Box 321  
Phoenix 1366-M  
Visalia, Calif.

Have proposition on your 360 that will interest you. Wire where I can reach you by phone.

H. I. MORSE  
141 W. Monroe  
Phoenix, Ariz. [42]

## DOCUMENT No. 23

Western Union  
SA 125 9—TDFE VISALIA CALIF 22 1050A  
1943 AUG 22 PM 12 27  
H I MOTR  
PHNX

Just received wire going to Coronado write me there.

B. G. SCOTT [43]

## DOCUMENT No. 24

Dear Friend Scott:

Received your wire this morning. Was called to me from Western Union about 5:00 A.M. It had been everywhere. Was addressed to H. I. Motr, Phoenix, Arizona. I am sending this letter to Coronado address on one of your letterheads.

My friend Kendall has offered to trade his 40 acres as a down payment at \$35,000. on your place at \$108,000, subject to lease pro rated to date of sale. I told him it was my understanding that this lease was for a sum of \$7400. with owner paying two acre ft. water assessment and that the lease was from July 1st, 1943 to July 1st, 1944 and that it was requirement that at least one third of the 360 was to be left in alfalfa. Kendall 40 acres is on the south-east corner of Missouri Ave. and Central Ave. and runs over to 7th street. It is all in alfalfa and is rented for \$25 per acre with tenant paying all the water—or at least that is what he informs me. Lease is for year from Aug. 1st, 1943.

I have been told that he paid \$32,000.00 for the place and he told me that he had been offered a profit of over \$2000. since buying it just a short time ago. His attorney informed him that it might be possible for both of you to save a little money on income taxes by trading rather than selling and paying the cash. However, I think that he will do either. He can sell this and pay the third down if you insist.

The lease would not be a hindrance to Kendall as he will not be able to get organized to take over until after the first of the year, but he plans on running it himself, or rather having his own man to do so. He plans to put it all in alfalfa, put in more improvements around the house and make it one of the show places of the valley, he says. He is also in the 90% brackett and said this place would help him out with his income [44] tax.

Let me hear from you as to which deal you prefer and I will get him signed up that way.

I sold four acres of citrus with nice house on north 16th Street last week for \$10,000. and have offers on two other places hanging fire besides this one. \$300. per acre seems to be about tops for general farm land.

Notice that Leo has quite a bit of land plowed. George Hawkins was in to see me last week and asked if I had heard from you. He remarked, "Leo is liable to break your neck if you sell that place out from under him" but I told George that Leo had plenty of time to buy it during past several years if he had wanted to do so, but that I was (unreadable) up to trade agreement subject to your acceptance and wire you, but if you prefer the cash angle with third down and will give him a few days I think he can dispose of this place and pay the down payment and meet your other terms as well. You can rest assured I am camping right on this deal until it is closed one way or other.

Sincerely yours

..... [45]

DOCUMENT No. 25

Sept. 1

Copy of  
Western Union Telegram

B. G. Scott  
1306 Sixth St.,  
Coronado, Calif.

Letter mailed to 1306 Sixth Street, Coronado

brought no answer. Please let me hear from you as to offer.

H. I. MORSE

141 West. [46]

DOCUMENT No. 26

Western Union

D237 7-Coronado, Calif. 3 945A

1943, Sep. 3 AM 11 11

H. I. Morse,

141 West Monroe St., Phxn.

Hope to be over next week. Writing.

SCOTT. [47]

DOCUMENT No. 27

Copy of

Western Union Telegram

Benson G. Scott,

1306 Sixth Street,

Coronado, Calif.

Have had no word from you since your wire of the 3rd. Would appreciate wire or letter or phone call giving us something definite. Good prospects are hard to get and we like to give service when we get an offer. Thanks for your co-operation.

H. I. MORSE,

141 W. Monroe

Phone 4-4189 [48]

DOCUMENT No. 28

September 20  
1943

Mr. Benson G. Scott,  
R. #4, Box 321,  
Visalia, California.

Dear Friend Scott:

Was glad to get your letter today. Immediately called my client, E. H. Kendall, and he came in and signed up a trade agreement to trade his place, (40 acres) on S. E. corner of Missouri Ave. and Central Ave., running clear over to 7th St., as down payment of \$35,000 on your place at \$108,000, subject to your lease to Leo Smith expiring July 1, 1944, to be prorated to date of sale. Mr. Kendall agrees to meet your terms as to balance on your place. Said he could meet most any terms you would like.

Mr. Kendall will be interested in buying even if you do not like the 40 acres. However, this is the choicest piece of subdivision property on the market. All in alfalfa and rented for \$25 per acre until August 1, 1944, with 30 day sales clause.

I think you would do well to come over at once. There is a deal either way if taken care of in time. Let me hear from you by return mail.

Sincerely yours,

H. I. MORSE. [49]

## DOCUMENT No. 29

Copy of  
Western Union Telegram

Benson G. Scott,  
1306 Sixth St.,  
Coronado, Calif.

. Have definite deal signed up on your place on trade as per letter. If trade not suitable, will arrange deal cash or terms as required by you. Would advise your coming over as soon as possible.

FARM & HOME INVEST-  
MENT CO.

By H. I. MORSE  
Phone 4-4189. [50]

## DOCUMENT No. 30

## Agreement For Exchange

This Agreement Witnesseth: That E. H. Kendall, owner of the following described:

First Piece of property situate, lying and being in County of Maricopa, State of Arizona, particularly described as follows, to-wit:

Lots 1-2-19 & 20 Orangewood Subdivision being forty acres more or less

which I agree to exchange for the following

Second Piece of property owned by Benson G. Scott situate in Maricopa County, Arizona, being the E $\frac{1}{2}$  of the SW $\frac{1}{4}$  of the SE $\frac{1}{4}$  of the NW $\frac{1}{4}$  and the S $\frac{1}{2}$  of the NE $\frac{1}{4}$  and the SE $\frac{1}{4}$  of Section 31, Twn. 2 North Range 2 East.

**Terms:**

Subject to Federal Land Bank loan of approx. Thirteen Thousand and subject to a balance of approximately sixty thousand & no/100 dollars to be paid according to terms & conditions required by said Benson G. Scott is hereby authorized to act as my agent in negotiating an exchange, he agree that if we shall secure an acceptance of the proposition to exchange the above described property on the above terms, that he will, within sixty days, furnish a Certificate of Title from a reputable and reliable Abstract Company, and to furnish a good and sufficient Deed conveying title to the property first above described. It is also presumed and understood that all principals to this agreement have investigated the respective properties, and the agent or broker is hereby released from all responsibility regarding valuation of same. The agent of any of the parties to this exchange agreement may act for and receive a commission from any of the other parties hereto.

And It Is Further Agreed with said E. H. Kendall that when we have [51] secured an acceptance of the proposition to exchange the above described property on the above terms, he then pay the sum of Seventeen hundred fifty & no/100 Dollars as commission for services rendered. And will allow a reasonable time for the furnishing of a Certificate of Title and good and sufficient Deed conveying the second of the above described properties.

Dated at Phoenix, this 21 day of Sept. 1943.

**E. H. KENDALL**

This Agreement Witnesseth: That Benson G. Scott of Coronado, Calif., owner of the second piece of property described within, hereby accept the proposition of exchange made therein, and upon the terms therein stated, and agree to furnish a Certificate of Title within Sixty days, showing the title to said property vested in Benson G. Scott and then to furnish a good and sufficient deed conveying title to said property to E. H. Kendall, or assigns. Subject to balance as specified to be evidenced by contract or mortgage, or representatives.

And I further agree to pay Farm & Home Inv. Co. Fifty four hundred & no/100 Dollars, commission for services rendered.

Dated at....., this.... day of....., 19....  
..... [52]

DOCUMENT No. 31

Copy of  
Western Union Telegram  
Phoenix, Arizona  
October 8th, 1943

Benson G. Scott,  
1306 Sixth Street,  
Coronado, Calif.

Wired you offer on Sept. twentieth at Coronado and wrote you at Visalia at same time. When may we expect you over or have you call me?

H. I. MORSE  
FARM & HOME INV. CO.  
141 West Monroe [53]

## DOCUMENT No. 32

Copy of  
Western Union Telegram

Benson G. Scott,  
1306 Sixth St.,  
Coronado, Calif.

May we have answer to our wires? Of Sept. 20th  
and Oct. 8th? We need you over here. Ans. Collect.

H. I. MORSE  
FARM & HOME INVEST-  
MENT CO.

141 W. Monroe  
Phone 4-4189 [54]

## DOCUMENT No. 33

Benson Scott  
1306 Sixth Street  
Coronado, California  
Saturday, 18th

My dear Morse:

Your wire today gave me a very guilty feeling. I have neglected writing you in the belief that the next day or two would see me in Phoenix; but each day gets away from me without my getting things in shape to get over. Yesterday I learned that I must be in the San Joaquin next week, so another week will get by before I can possibly get over there. At the end of next week I shall tell you when I will be there.

On the matter of the deal: I understand just about what you are thinking, and from your point

of view you have a right to think that I am a hell of a guy to do business with. However I shall not attempt to do anything until I am in Phoenix. Of course this may well cost me more by several times than I am making here, and yet damned If I can get away.

The trade your party has sounds as if I might want it, but again, I can make no decision until I see it.

It is not clear to me that your party will definitely buy. I think you know all there is to know about that place, and the lease. Will your party make a definite offer and put up some earnest money to bind it, for the property, subject to the lease, and for delivery on a certain date. In short, is this a deal or is it a prospect. If it is a prospect I will not feel too badly if we delay for another week or ten days. If you have the deal ready to close I will cut my time in the San Joaquin as short as possible and get there a few days earlier. Write me a line at this address and they will send it on up to me, or better still send it to my Visalia address.

[55]

And Morse get this straight no one ever worked on my affairs, or did me a favor that he didn't get just compensation for it, so take it easy and keep your eyes and ears open for a proposition that will bring us both in an honest dollar or two.

All for now,

yours,

SCOTT. [56]

## DOCUMENT No. 34

Phoenix Real Estate Board  
Standard Form

Purchase Contract and Deposit Receipt

Farm &amp; Home Investment Co.

141 West Monroe St. Phone 4-4189

Phoenix, Arizona, October 25, 1943

Received From E. H. Kendall residing at 126 E. Country Club Drive, Phone..... the sum of Ten Thousand and No/100 Dollars (\$10,000.00), as earnest money and part purchase price of the following described property situated in Maricopa County, Arizona, to-wit:

SE $\frac{1}{4}$  & S $\frac{1}{2}$  NE $\frac{1}{4}$  & E $\frac{1}{2}$  SW $\frac{1}{4}$  & SE $\frac{1}{4}$  of  
NW $\frac{1}{4}$  Sec. 31 Twn. 2N. Range 2E. approx.  
360 A. together with improvements thereon

for the full purchase price of One hundred eight thousand and no/100 Dollars (\$108,000.00), the balance of the purchase price to be paid as follows, to-wit:

Ten thousand & No/100 dollars as above an additional twenty-two thousand four hundred upon placing agreement in escrow, an additional 30% or \$32,400 on or before 1 year from Jan. 1, 1944, an additional 30% or \$32,400 on or before Jan. 1, 1945, and an additional payt. of \$10,800 which represents payment in full on or before Jan. 1, 1946. Above deferred payments to bear interest at 5% per annum. Purchaser agrees to take possession subject to lease

expiring as of July 1, 1943. Rents to be pro-rated as of Jan. 1, 1944. It is also understood that said rental is \$7,400 annually.

Interest on deferred payments at the rate of.....  
per cent per annum, from.....payable.....

[57]

**It Is Hereby Agreed:** First: That in the event said purchaser shall fail to pay the balance of said purchase price, or complete said purchase as herein provided, the seller may demand specific performance of this Contract, or may retain the amount paid herein as liquidated and agreed damages, as he may elect.

Second: The purchaser and seller agree that if the title to the above property be defective, ninety days from this time will be given the seller, or his agent, to perfect same. If said title cannot be perfected within said time limit, the earnest money received for herein shall be returned to the purchaser and this Contract cancelled.

Third: That the evidence of title, which is to be furnished and paid for by the seller, is to be in the form of Title Insurance or Certificate of Title, subject to existing rights of way or easements; and building and other restrictive covenants of record. The conveyance of these premises shall be by warranty deed, subject to the conditions of this agreement.

Fourth: That this Contract shall become binding only when executed by the purchaser and by the seller, and shall be in full force and effect from the date of such execution.

Fifth: That the seller shall not consent to any cancellation of this agreement without first obtaining the written consent of the agent to such cancellation.

Sixth: That all items affecting said property shall be prorated in the following manner, to-wit: Principal payments.....Interest..... Taxes Prorate Jan. 1, 1944. Insurance Prorate Jan. 1, 1944. Irrigation Bonds and Assessments due subsequent to..... Water..... Paving Lien installments due subsequent [58] to none Rents Prorate Jan. 1, 1944.

Seventh: Possession to the property to be given Subject to Lease.

Eighth: Time is declared to be the essence of this Contract, but the time for any act required to be done may be extended not longer than thirty days by.....

Ninth: There are no oral agreements not contained herein.

FARM & HOME INVEST-  
MENT CO.

Broker.

By E. J. HEBETS

I agree to purchase the above described property on the terms and conditions herein stated, provided the acceptance of this agreement by the seller, or his authorized agent, is made on or before December 15, 1943, at 12 Noon (a.m) (p.m.)

E. H. KENDALL

.....  
Purchaser.

I (or we) agree to sell the above described property on the terms and conditions herein stated and agree to pay the above signed agent as commission the sum of ..... Dollars (\$.....), or one-half the deposit in case same is forfeited by the purchaser, provided same shall not exceed the full amount of the commission.

.....  
.....

Seller.

.....  
Witness

(This form is prepared by the Phoenix Real Estate Board for use of its members only.) [59]

DOCUMENT No. 35

Copy of  
Western Union Telegraph

Benson G. Scott,  
1306 Sixth St.,  
Coronado, Calif

Please do not delay longer than absolutely necessary. Nervous strain has put Morse in the hospital.

E. J. HEBETS,  
Realtor,  
Farm & Home Investment Co.  
Phone 4-4189 [60]

## DOCUMENT No. 36

Western Union

D140 9—TDBY Coronado Calif 27 842A 1943

Oct. 27 AM 10 06

I. Morse

141 West Monroe St. PHX

Cannot get report until next week will wire them

SCOTT [61]

## DOCUMENT No. 37

November 15, 1943

Mr. Benson G. Scott,  
1306 Sixth St.,  
Coronado,  
Calif.

Dear Friend Scott:

I have been out of office for the past three weeks due to illness, hemorrhage from stomach ulcers.

It seems that not much progress has been made on your deal during my absence, though we have had Kendall's deposit of \$10,000 since October 25th and your wire of October 27th promising report the following week still has not been followed by anything definite.

We have been working on this deal for a long time and when you turned down the Burris offer of \$100,000, you gave us a definite price of \$108,000 with 30% down and balance over a period not to exceed 3 years time. You also stated that there would be no raise in price until we were given ample notice and, further, that no other Broker would be

given a listing without giving us an opportunity to close up on any prospects we had been working on.

We took the above to be a "Gentlemen's agreement" and have produced a buyer ready and willing to buy on above terms and we believe that we have completed our part of the agreement and you have had ample time to comply with your part of the agreement. If there is any time limit you wish to put on closing the deal, that can be arranged, but we don't feel that you are treating us right in ignoring our telegrams and this offer.

In your last paragraph of your letter of Oct. 18th, 1943, you stated, "And Morse, get this straight, no one ever worked on my affairs, or did me a favor that he didn't get just [62] compensation for it", well, that is just what I expect and in this case, we have sold your place as per our agreement and we also feel bound to our client to deliver the place unless there is some flaw in title. Kendall has been very lenient with us and came out to see me while I was in bed to tell me he would wait until I got back to the office before taking further action. He is ready to go right on through with this deal as agreed. It is now up to you.

Sincerely yours,

FARM & HOME INVESTMENT  
CO.

H. I. MORSE. [63]

DOCUMENT No. 38

Western Union

Phoenix, Arizona

November 27th, 1943

Benson G. Scott  
1306 Sixth Street  
Coronado, California

Kendall wants acknowledgement of his acceptance of your proposition on rach. Ready to escrow deal.

H. I. MORSE

Farm & Home Inv. Co.

141 West Monroe

Phoenix, Arizona [64]

DOCUMENT No. 39

Copy of

Western Union Telegram

November 29, 1943

Benson G. Scott  
1306 Sixth Street  
Coronado, California

Advise coming over immediately to close deal.

H. I. MORSE,

Farm & Home Investment Co.

141 W. Monroe,

Phone 4-4189 [65]

## DOCUMENT No. 40

Benson Scott  
1306 Sixth Street  
Coronado, California  
Nov. 29, 1943

Farm & Home Investment Co.

Phoenix

H. I. Morse

Dear Morse:

Your letters and wires have, I suppose, all been received by me. I have delayed answering them, though they should have been acknowledged, because I didnt want to tell you that I couldnt accept your proposition at this time. I have been hoping from day to day that the picture would change. It hasnt at this writing.

I cannot get to Phoenix before the middle of the month.

I am not trying to sell the place through, or to, any one. My inability to close a deal hasnt the remotest connection with any one in Arizona, the price of land, or World War II. When I can give you any other news I will write you.

Yours,

SCOTT [66]

DOCUMENT No. 41

Copy of  
Western Union Telegram

December 2, 1943

Benson G. Scott,  
1306 Sixth St.,  
Coronado, Calif.

Re. your letter Nov. 29th advise us by wire when you can deliver. Escrow agreement has been sent you by Ariz. Title Co. requiring your signature on, or before Dec. 15, 1943, after which time acceptance might be withdrawn and sale lost.

E. J. HEBETS

Realtor  
141 W. Monroe  
Phone 4-4189 [67]

DOCUMENT No. 42

December 6, 1943

Benson G. Scott,  
1306 Sixth St.,  
Coronado, Calif.

Dear Mr. Scott:

We have received no answer to our wire regarding your letter of November 29th. Consequently I am writing this letter owing to the urgency of some action being taken before December 15th.

Since you state in your letter that your delay has nothing to do with the price of the land or anyone in Arizona, I presume it would be of no advantage in arriving at your decision if the price picture were

changed. Personally, I feel that if it is possible to make a deal at all, the deal should be made at the price agreed upon. I don't believe in trying to raise the price on a man in the middle of a deal. However, if it were a deciding factor in closing a deal right away, I fully believe Mr. Kendall would agree to pay \$325 per acre rather than lose the deal. That is, if we could have definite assurance from you that you would go ahead with the deal as otherwise outlined in the escrow instructions mailed you by the Arizona Title Co.

Please advise us by return Air Mail what can be done and how long it will take to do it.

Very truly yours,

FARM & HOME INVESTMENT  
CO.  
E. J. HEBETS,  
Realtor. [68]

#### DOCUMENT No. 43

Western Union

D13 NL-Coronado Calif 9 1943 Dec 10 AM 1 20

E. J. Hebets

141 West Monroe St. Phx

Wire of second and letter of sixth received thanks for offer price no deciding factor Stop Find it impossible to make deal Stop Will see you when I come over

B G SCOTT [69]

Copy Received and Service Acknowledged This  
26 Day of June, 1944

By ROULAND W. HILL

Attorney for Hill Robert &  
Hill

[Endorsed]: Filed Jun. 28, 1944. [70]

---

[Title of District Court and Cause.]

**STIPULATION**

It is stipulated by and between plaintiff and defendant, that the documents numbered 1 to 43 inclusive, full, true and correct copies of which are annexed to defendant's motion for summary judgment herein, constitute and include all of the writings, by or between plaintiff and defendant in the possession of, or known to, plaintiff and defendant, in respect of the promise or agreement alleged in plaintiff's amended complaint herein.

Dated this 27th day of November, 1944.

HILL, ROBERT & HILL

By ROULAND W. HILL

Attorneys for Plaintiff

BLAINE B. SHIMMEL

Attorney for Defendant

[Endorsed]: Filed Nov. 28, 1944. [71]

[Title of District Court and Cause.]

Minute Entry of Monday, May 22, 1944  
(Phoenix Division)

April 1944 Term                           At Phoenix

Honorable Dave W. Ling, United States District  
Judge, Presiding.

The motion of defendant for order requiring the production of documents and the motion of plaintiff for production of documents under Rule 34, come on regularly for hearing this day.

Rouland W. Hill, Esquire, is present on behalf of the plaintiff and Blaine B. Shimmel, Esquire, is present for the defendant.

It Is Ordered that the motion of defendant for an order requiring production of documents be and it is granted, and

It Is Further Ordered that the motion of plaintiff for production of documents under Rule 34 be and it is granted.

---

[Title of District Court and Cause.]

Minute Entry of Monday, October 16, 1944  
(Phoenix Division)

October 1944 Term                           At Phoenix

Honorable Dave W. Ling, United States District  
Judge, Presiding.

It Is Ordered that the defendant's motion for summary judgment herein be and it is denied. [72]

## [Title of District Court and Cause.]

Minute Entry of Wednesday, October 18, 1944  
(Phoenix Division)

October 1944 Term                    At Phoenix

Honorable Dave W. Ling, United States District  
Judge, Presiding.

It Is Ordered that the order heretofore entered  
herein denying defendant's motion for a summary  
judgment be and it is vacated.

---

## [Title of District Court and Cause.]

Minute Entry of Monday, November 27, 1944  
(Phoenix Division)

October 1944 Term                    At Phoenix

Honorable Dave W. Ling, United States District  
Judge, Presiding.

Rouland Hill, Esquire is present for the plain-  
tiff and Blaine B. Shimmel, Esquire appears on  
behalf of the defendant.

Argument is now duly had on defendant's motion  
for summary judgment, and

It Is Ordered that the defendant's motion for  
summary judgment be and it is submitted and by  
the Court taken under advisement.

[Title of District Court and Cause.]

Minute Entry of Monday, December 11, 1944  
(Phoenix Division)

October 1944 Term                           At Phoenix

Honorable Dave W. Ling, United States District  
Judge, Presiding.

The defendant's motion for summary judgment  
having been submitted heretofore,

It Is Ordered that the defendant have summary  
judgment herein.

---

[Title of District Court and Cause.]

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW**

This cause having been heard upon defendant's  
motion for summary judgment and plaintiff's op-  
position thereto, the court makes the following

**FINDINGS OF FACT**

1. That as stipulated by plaintiff and defendant,  
the documents numbered 1 to 43 inclusive, full,  
true and correct copies of which are annexed to  
defendant's motion for summary judgment, consti-  
tute and include all of the writings, by or between  
plaintiff and defendant, in the possession of or  
known to plaintiff and defendant, in respect of the  
promise or agreement alleged in plaintiff's amended  
complaint.

2. That said writings contain no memorandum

in writing signed by defendant, or any person by him thereunto lawfully authorized, of the promise or agreement alleged in plaintiff's amended complaint.

From which findings, the court adduces the following

### CONCLUSION OF LAW

1. That the claim alleged in plaintiff's amended complaint are, and each of them is, barred by the provisions of Section 58-101, Arizona Code Annotated, 1939.

Done this 21 day of December, 1944.

DAVE W. LING

Judge [74]

Approved as to Form, this 19 day of December, 1944.

HILL, ROBERT & HILL

By ROULAND W. HILL

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 21, 1944. [75]

---

[Title of District Court and Cause.]

Minute Entry of Thursday, December 21, 1944  
(Phoenix Division)

October 1944 Term                           At Phoenix

Honorable Dave W. Ling, United States District  
Judge, Presiding.

Defendant's Findings of Fact and Conclusions

of Law having been heretofore submitted and by the Court taken under advisement,

It Is Ordered that the same be approved and filed as the Findings of Fact and Conclusions of Law herein.

Thereupon, It Is Ordered that the form of judgment now regularly presented be approved, filed, entered and spread upon the minutes as the judgment herein as follows:

No. Civ. 546—Phoenix

**E. J. HEBETS,**

**Plaintiff,**

**vs.**

**BENSON G. SCOTT,**

**Defendant.**

**JUDGMENT**

Pursuant to the order made and entered herein on December 11, 1944, that defendant have summary judgment herein,

It Is Ordered and Adjudged that plaintiff take nothing by his amended complaint herein, and that defendant have judgment against plaintiff for his costs herein, taxed in the sum of \$33.55.

Done in Open Court, this 21 day of December, 1944.

**DAVE W. LING**

**Judge.**

Approved as to Form, this 16 day of December,  
1944.

HILL, ROBERT & HILL  
By ROULAND W. HILL  
Attorneys for Plaintiff. [76]

---

[Title of District Court and Cause.]

**NOTICE OF APPEAL**

Notice is hereby given that E. J. Hebets, Plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order of the above Court that the defendant have summary judgment, which order was entered in the civil docket of said Court on December 11, 1944; and from the order and judgment of the above Court that Plaintiff take nothing by his amended complaint; and that the findings of fact and conclusions of law be approved and filed as the findings of fact and conclusions of law herein, and that the form of judgment presented be approved, filed, entered and spread upon the minutes as the judgment herein, which order was entered in the civil docket of said Court on December 21, 1944.

Dated this 8 day of January, 1945.

HILL, ROBERT & HILL  
ROULAND W. HILL  
Attorneys for Plaintiff

A copy of the foregoing Notice of Appeal was served on me this 8th day of January, 1945.

BLAINE B. SHIMMEL

By A.C.

Attorney for Defendant. [77]

[Endorsed]: Filed Jan. 8, 1945. [78]

---

[Title of District Court and Cause.]

BOND ON APPEAL

State of Arizona,  
County of Maricopa—ss.

Know All Men by These Presents:

That E. J. Hebets, of Phoenix, Maricopa County, State of Arizona, as principal, and the National Surety Corporation, as surety, are firmly held and bound unto the above named Benson G. Scott in the sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said Benson G. Scott for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns jointly and severally, firmly by these presents.

Whereas on December 11, 1944 an order was entered in the above entitled proceeding that the said defendant, Benson G. Scott, have summary judgment herein; and

Whereas an order and judgment was entered in the above entitled proceeding on December 21, 1944 that the findings of fact and conclusions of law be approved and filed as the findings of fact and con-

clusions of law in the above entitled proceeding and that the form of judgment presented be approved, filed, entered and spread upon the minutes as the judgment in the above entitled proceeding, and that the plaintiff take nothing by his amended complaint. [79]

And the appellant, E. J. Hebets, feeling aggrieved thereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, therefore, the condition of this obligation is such, that if the aforesaid judgment is affirmed or modified by the appellate court, or if the appeal is dismissed, the appellant, E. J. Hebets, will pay all costs which may be awarded against him on said appeal.

Witness our hands hereto this 6 day of January, 1945.

E. J. HEBETS

E. J. Hebets,

Principal

[Seal]

NATIONAL SURETY  
CORPORATION

Surety

By B. H. ALARENDAR  
Attorney-in-Fact

A copy of the foregoing Bond on Appeal was served on me this 8th day of January, 1945.

BLAINE B. SHIMMEL

By A.C.

Attorney for Defendant.

[Endorsed]: Filed Jan. 8, 1945. [80]

[Title of District Court and Cause.]

STATEMENT OF POINT ON WHICH PLAINTIFF AND APPELLANT INTENDS TO RELY ON APPEAL

Comes Now E. J. Hebets, plaintiff above named and appellant, and states that he intends to rely on appeal on the following point:

The documents numbered 1 to 43 attached and made a part of defendant's motion for summary judgment, constitute a sufficient memorandum of an agreement authorizing and employing the plaintiff as a broker to sell real property to take the said agreement out of the operation of the statute of frauds, to-wit, Section 58-101 Arizona Code Annotated 1939.

Dated this 8 day of January, 1945.

HILL, ROBERT & HILL

ROULAND W. HILL

Attorneys for Plaintiff

A copy of the foregoing Statement of Point on which Plaintiff and Appellant intends to Rely on Appeal was served on me this 8th day of January, 1945.

BLAINE B. SHIMMELL

Attorneys for Defendant

By A. C. [81]

[Endorsed]: Filed, Jan. 8, 1945. [82]

[Title of District Court and Cause.]

PLAINTIFF'S AND APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following and no other papers and exhibits, to-wit:

1. Plaintiff's amended complaint.
2. Defendant's answer.
3. Defendant's motion for summary judgment and documents numbered 1 to 43, inclusive, attached to and made a part of said motion.
4. Stipulation dated November 27, 1944 and filed November 28, 1944.
5. Order of December 11, 1944 that defendant have summary judgment.
6. Findings of fact and conclusions of law filed December 21, 1944.
7. Judgment filed December 21, 1944.
8. Notice of appeal.
9. Bond on appeal.
10. Statement of point on which plaintiff and appellant intends to rely on appeal.
11. Each and every minute entry and order rendered and entered by the trial court other than those heretofore particularly specified. [83]
12. This designation of contents of record on appeal.

Dated this 8th day of January, 1945.

HILL, ROBERT & HILL  
ROULAND W. HILL

Attorneys for Plaintiff  
and Appellant

A copy of the foregoing Plaintiff's and Appellant's Designation of Contents of Record on Appeal was served on me this 8th day of January, 1945.

BLAINE B. SHIMMELL

Attorney for Defendant

By A.C.

[Endorsed]: Filed Jan. 8, 1945. [84]

---

[Title of District Court and Cause.]

STIPULATION OF PARTS OF RECORD TO  
BE INCLUDED IN RECORD ON AP-  
PEAL

It is stipulated by and between the parties hereto by their respective attorneys of record that the following parts of the record in the above case be included in the record on appeal:

1. All those parts of the record heretofore designated by the plaintiff and appellant.
2. Petition for removal.
3. Order for removal.
4. The stipulation.

Dated this 16th day of January, 1945.

HILL, ROBERT & HILL

ROULAND W. HILL

Attorneys for Plaintiff  
and Appellant

BLAINE B. SHIMMELL

Attorney for Defendant  
and Appellee

[Endorsed]: Filed Jan. 16, 1945. [85]

---

In the United States District Court  
for the District of Arizona

**CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD**

United States of America,

District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of E. J. Heberts, Plaintiff, versus Benson G. Scott, Defendant, numbered Civil-546-Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 85, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the Designation of Contents of Record

on Appeal and Stipulation of Additional Record on Appeal filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$10.15 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the Seal of the said Court this 19th day of January, 1945.

[Seal]                   EDWARD W. SCRUGGS  
                            Clerk [86]

---

[Endorsed]: No. 10974. United States Circuit Court of Appeals for the Ninth Circuit. E. J. Hebets, Appellant, vs. Bensen G. Scott, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the District of Arizona.

Filed January 30, 1945.

PAUL P. O'BRIEN  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10974

E. J. HEBETS,

Appellant,

vs

BENSON G. SCOTT,

Appellee.

STATEMENT ADOPTING STATEMENT OF  
POINT ON WHICH PLAINTIFF AND  
APPELLANT INTENDS TO RELY ON  
APPEAL

Comes now appellant and respectfully states that he adopts the statement of point on which plaintiff and appellant intends to rely on appeal heretofore filed with the Clerk of the trial court on the 8th day of January, 1945 as the statement of points upon which he intends to rely on appeal.

Dated this 27th day of January, 1945.

HILL, ROBERT & HILL

ROULAND W. HILL

Attorneys for Appellant

A copy of the foregoing Statement was served on me this 27th day of January, 1945.

BLAINE B. SHIMMELL

Attorney for Appellee

By R.C.

[Endorsed]: Filed Jan. 30, 1945. Paul P.  
O'Brien, Clerk.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10974

E. J. HEBETS,

Appellant,

vs

BENSON G. SCOTT,

Appellee.

DESIGNATION OF PARTS OF THE RECORD  
WHICH APPELLANT CONSIDERS NEC-  
ESSARY FOR THE CONSIDERATION OF  
THE APPEAL

To the Clerk of the Above Court:

Appellant respectfully designates the following parts of the record on appeal in the above case as necessary for the consideration of the appeal and respectfully requests that the Clerk print the following parts of the record only, to-wit:

1. Plaintiff's amended complaint.
2. Defendant's answer.
3. Defendant's motion for summary judgment and documents numbered 1 to 43, inclusive, attached to and made a part of said motion.
4. Stipulation dated November 27, 1944 and filed November 28, 1944.
5. Order of December 11, 1944 that defendant have summary judgment.
6. Findings of fact and conclusions of law filed December 21, 1944.

7. Judgment filed December 21, 1944.
8. Notice of appeal.
9. Bond on appeal.
10. Statement of point on which plaintiff and appellant intends to reply on appeal.
11. Each and every minute entry and order rendered and entered by the trial court other than those heretofore particularly specified.
12. Designation of contents of record on appeal.
13. Petition for removal.
14. Order of removal.
15. Stipulation of parts of record to be included in record on appeal, dated January 16, 1945.
16. Statement adopting statement of point on which plaintiff and appellant intends to rely on appeal.
17. This designation of the parts of the record which appellant considers necessary for consideration on appeal.

Dated this 27th day of January, 1945.

HILL, ROBERT & HILL

ROULAND W. HILL

Attorneys for Appellant

A copy of the foregoing Designation was served on me this 27th day of January, 1945.

BLAINE B. SHIMMEL

Attorney for Apellee

By AC

[Endorsed]: Filed Jan. 30, 1945, Paul P. O'Brien, Clerk.



No. 10974

---

IN THE  
United States  
**Circuit Court of Appeals**  
For the Ninth Circuit

---

E. J. HEBETS,

*Appellant,*

vs.

BENSON G. SCOTT,

*Appellee.*

---

APPELLANT'S OPENING BRIEF

---

HILL, ROBERT & HILL  
Attorneys for Appellant  
405 Luhrs Tower  
PHOENIX, ARIZONA

**FILED**

APR - 3 1945

PAUL D. CIRERED



## TOPICAL INDEX

Statement of Pleadings and Facts Disclosing Basis of Jurisdiction .....	1
Statement of Case .....	5
Specification of Errors .....	6
Summary .....	7
<b>Argument—</b>	
Point I. A Contract Binding Under the Statute of Frauds May Be Gathered From Letters, Writings and Telegrams Between the Parties.....	8
Point II. The Statute of Frauds Is Merely a Rule of Evidence and a Contract will be Construed if it May Consistently Be Done to be Effective Rather Than Ineffective Under the Statute of Frauds .....	9
Point III. All That Is Necessary to Take a Contract Out of the Operation of the Statute of Frauds Is That the Essential Elements of the Contract Be Expressed in Writing and Signed By the Party to Be Charged .....	10
Point IV. Subdivision 7 of Section 58-101 Arizona Code Annotated, 1939, With the Construction Placed Upon it by the California Courts Was Lifted From the Law of California and Such Construction Is Controlling Here.....	11
Point V. Said Writings Contain All of the Essential Elements of the Agreement and are Sufficient to Take the Agreement Out of the Statute of Frauds .....	13

TABLE OF AUTHORITIES CITED  
CASES

	Page
Bartlett-Heard Land & Cattle Co. v. Harris 28 Ariz. 497, 238 Pac. 327.....	8, 9, 10
Bibb v. Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. Ed. 819 .....	9
Brought v. Howard, 30 Ariz. 522, 249 Pac. 76.....	12
Curran v. Hubbard (Calif.), 114 Pac. 81.....	20
Cowing v. Wofford, 229 Pac. 883.....	22
Friedman v. Suttle, 10 Ariz. 57, 85 Pac. 726.....	11
Hall v. Rankin, 22 Ariz. 13, 193 Pac. 756.....	10
Henrietta Mining & Milling Co. v. Gardner, 173 U. S. 123, 19 S. Ct. 327, 42 L. Ed. 637.....	12
Kennedy v. Merickel (Cal.), 97 Pac. 81.....	11-22
McCartney v. Clover Valley Land & Stock Co. 232 Fed. 697, 1 A. L. R. 1127.....	9, 23
Murphy v. Brown, 12 Ariz. 268, 100 Pac. 801.....	11
Murphy v. Smith, 26 Ariz. 394, 226 Pac. 206.....	12
Needham v. Abbott Kinney Co. (Calif.), 17 Pac. 2nd 109 .....	14
Pray v. Anthony (Calif.), 274 Pac. 1024 .....	14
Ryan v. U. S., 136 U. S. 68, 10 S. Ct. 913, 34 L. Ed. 447 .....	9
Territory v. Copper Queen Consolidated Mining Co., 13 Ariz. 198, 108 Pac. 960. Affirmed 233 U. S. 87, 34 S. Ct. 546, 58 L. Ed. 863.....	12

## STATUTES

	Page
Sec. 58-101 Arizona Code Annotated 1939, subdivision 7 .....	3, 5, 7, 8, 11
Sec. 3272, 1913 Arizona Civil Code, sub- division 7 .....	11, 12
Sec. 3272, 1913 Arizona Civil Code, sub- division 8 .....	12
Sec. 1624, California Civil Code, sub- division 6 .....	11, 12
28 U. S. C. A. Sec. 41 .....	4
28 U. S. C. A. Sec. 225 .....	4
28 U. S. C. A. Sec. 230 .....	5



IN THE  
United States  
**Circuit Court of Appeals**  
For the Ninth Circuit

---

E. J. HEBETS,

*Appellant,*

vs.

BENSON G. SCOTT,

*Appellee.*

---

APPELLANT'S OPENING BRIEF

---

STATEMENT OF PLEADINGS AND FACTS  
DISCLOSING BASIS OF JURISDICTION

Appellant, a real estate broker and a resident of the State of Arizona, (T. 3), brought this action against Appellee, a resident and citizen of the State of California. (T. 3). In his amended complaint he alleged that on or about June 1, 1943, the Appellee

employed him to obtain a purchaser for real estate that the Appellee owned in Maricopa County; that the Appellee agreed to pay him a commission of 5% on the sale price; that a memorandum of such promise and agreement was in writing and signed by the Appellee; that on or about September 20, 1943, the Appellant negotiated a sale for Appellee's land under the terms of the agreement, which the said purchaser was willing, ready and able to complete on the terms agreed to by appellee; that Appellant performed all of the conditions of his contract and was entitled to be paid his commission amounting to the sum of Five Thousand Four Hundred and no/100 dollars (\$5,400.00).

A second cause of action was set forth alleging that Appellant had performed services for the Appellee at his request in the selling of said real estate for the sum of One Hundred Eight Thousand (\$108,000.00) Dollars, and that such services were reasonably worth the sum of Five Thousand Four Hundred (\$5,400.00) Dollars. (T. 6-9).

Appellee answered that he did not employ the Appellant; that he did not agree to pay him a commission and that there was no memorandum of any such promise or agreement in writing or signed by the Appellee. He denied that the Appellant had negotiated a sale of the land; that the Appellant had ever procured a purchaser, and that there was ever any agreement between the parties in respect to the Appellee's land. He admitted that he had not paid the Appel-

lant anything and denied that he owed the Appellant any amount. In answer to the second cause of action he denied that the appellant had performed services for the Appellee or that he ever entered into any agreement with the Appellant. He denied that any services performed were worth Five Thousand Four Hundred (\$5,400.00) Dollars or any amount and admitted that he had not paid the Appellant anything, and denied there was a memorandum of the alleged promise or agreement in writing signed by the Appellee. (T. 9-12).

Appellee filed his motion for summary judgment, to which was attached forty-three documents (T. 12-54), which documents the parties stipulated to be full, true and correct copies of all the writings by and between the parties in the possession of or known to the parties with respect of the promise or agreement set forth in the Appellant's complaint. (T. 55).

The Court made its findings of fact and conclusions of law (T. 58-59), wherein it found that the said writings contained no memorandum in writing, signed by the Appellee or any person by him thereunto lawfully authorized, of the promise or agreement alleged in the Appellant's complaint and concluded that the claims alleged in the Appellant's complaint were barred by the provisions of Section 58-101 Arizona Code Annotated 1939. Accordingly judgment was rendered by the Court dismissing Appellant's complaint, (T. 60), from which judgment and findings Appellant has appealed to this Court.

The statutory provision supporting the jurisdiction of the district court is 28 U. S. C. A. Section 41.

"The District Courts shall have original jurisdiction as follows: (1) When the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00, and, \* \* \* (b) is between citizens of different states \* \* \*."

The statutory provision giving this honorable Court jurisdiction on appeal is 28 U. S. C. A. Section 225, (a), as follows:

"The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal, or writ of error, final decisions—First, in the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

The pleadings show the existence of jurisdiction in the amended complaint (T. 6), and the petition for removal (T. 3).

Notice of appeal was filed on January 8, 1945 by Appellant (T. 62). The bond on appeal was filed on February 8, 1945, (T. 63). The designation of contents of record on appeal was filed on the 8th day of January, 1945 (T. 67), along with the statement of point on which Plaintiff and Appellant intends to rely on appeal (T. 64). A stipulation of parts of record to be included in the record on appeal was filed on January 16, 1945 (T. 67). The record on appeal was filed and the action docketed on January 30, 1945

with the Clerk of this Court (T. 68) and on the same day Appellant filed in this Court his designation of parts of the record which Appellant considered necessary for the consideration of the appeal, (T. 71) and his statement adopting statement of point on which Plaintiff and Appellant intends to rely on appeal (T. 69).

By virtue thereof, all of which proceedings were taken within the time provided by the Federal Code, 28 U. S. C. A. Section 230 and the rules of this Court, this cause is now before this honorable Court.

#### STATEMENT OF CASE

This action is to recover a commission upon a broker's agreement for procuring a purchaser ready, willing and able to buy the Appellee's real estate.

Appellee's motion for a summary judgment, which was granted by the District Court, was based upon the proposition that such action could not be maintained because the promise or agreement or some memorandum thereof was not in writing and signed by the Appellee. Hence the action was barred by Section 58-101 Arizona Code Annotated 1939, the pertinent parts of which are as follows:

"No action shall be brought in any Court in the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing

and signed by the parties to be charged therewith, or by some person by him thereunto lawfully authorized:

'7. Upon an agreement authorizing or employing an agent or broker to purchase or sell real property, or mines, for compensation or a commission;'

Forty-three documents (T. 14-54), consisting of letters and telegrams of the parties which are stipulated to be correct copies of the correspondence between them are relied upon by the Appellant as sufficient memoranda in writing of the agreement or promise to enable Appellant to maintain this action.

Appellee's position is that such documents are insufficient to take the transaction out of the operation of the statute.

#### SPECIFICATIONS OF ERROR

1. The District Court erred in its finding of fact (T. 58, 59) that said writings contained no memorandum in writing signed by the Appellee or any person by him thereto lawfully authorized of the promise or agreement alleged in Appellant's amended complaint in that said writings do constitute sufficient memoranda in writing signed by the Appellee of an agreement authorizing or employing Appellant as his agent or broker to sell real property for compensation or a commission, to enable the Appellant to maintain this action.

2. The District Court erred in its conclusion of law, (T. 59) that the claim alleged in the amended complaint is barred by the provisions of Section 58-101, Arizona Code Annotated, 1939, for the reason that the agreement upon which Appellant's action was brought or some memorandum thereof is in writing and signed by the Appellee and is not barred by the said statute.

3. The District Court erred in granting Appellee's motion for a summary judgment and rendering judgment (T. 60) dismissing the amended complaint for the reason that the said writings constitute sufficient memoranda in writing signed by the Appellee to enable the Appellant to maintain this action.

#### SUMMARY

The said writings (T. 14-54) are sufficient to meet the requirements of Section 58-101 Arizona Code Annotated 1939; that an action shall not be brought upon an agreement authorizing or employing an agent or broker to purchase or sell real property for compensation, unless such promise or agreement or some memorandum thereof be in writing and signed by the parties to be charged.

1. A contract binding under the statute of frauds may be gathered from letters, writings and telegrams between the parties.

2. The statute of frauds is merely a rule of evidence, and a contract will be construed if it may consistently be done to be effective rather than ineffective under the statute of frauds.

3. All that is necessary to take a contract out of the operation of the statute of frauds is that the essential elements of the contract be expressed in writing and signed by the party to be charged.

4. Subdivision 7 of Section 58-101 Arizona Code Annotated, 1939, with the construction placed upon it by the California Courts was lifted from the law of California and such construction is controlling.

5. Said writings contain all of the essential elements of the agreement and are sufficient to take the agreement out of the operation of the statute of frauds.

## A R G U M E N T

### POINT I.

A CONTRACT BINDING UNDER THE STATUTE OF FRAUDS MAY BE GATHERED FROM LETTERS, WRITINGS AND TELEGRAMS BETWEEN THE PARTIES.

In the case of Bartlett-Heard Land & Cattle Co. v. Harris, 28 Ariz. 497, 238 Pac. 327, where the Court was considering the Arizona statute of frauds it is stated on page 329:

"And, of course, several letters and telegrams may be taken together and considered with reference to each other, in order to make up the required memorandum,"

Citing with approval the case of Bibb vs. Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. Ed. 819.

In the case of Ryan vs. U. S., 136 U. S. 68, 10 S. Ct. 913, 34 L. Ed. 447, the Court held that a complete contract binding under the statute of frauds may be gathered from letters, writings and telegrams between the parties relating to the subject matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract.

To the same effect is the case of McCartney vs. Clover Valley Land & Stock Co. (C.C.A. 8th), 232 Fed. 697, 1 A.L.R. 1127.

## POINT II.

THE STATUTE OF FRAUDS IS MERELY A RULE OF EVIDENCE AND A CONTRACT WILL BE CONSTRUED IF IT MAY CONSISTENTLY BE DONE TO BE EFFECTIVE RATHER THAN IN-EFFECTIVE UNDER THE STATUTE OF FRAUDS.

In the case of Bartlett-Heard Land & Cattle Co. vs. Harris, (Ariz.) *supra*, the Court stated on Page 329:

“The statute of frauds is merely a rule of evidence, and not one governing the making of a contract, and its purpose is to prevent a party from being compelled, by oral and perhaps false

testimony, to be held responsible for the conditions of a contract he claims he never agreed to. But, if that party has offered in writing to make the very contract with which it is sought to charge him, he has over his own signature admitted his willingness to be held thereby, and cannot justly complain because the acceptance of the other party who seeks to hold him is oral."

In Hall vs. Rankin, 22 Ariz. 13, 193 Pac. 756, in a case involving the Arizona statute of frauds, the court stated on page 757:

"It is a familiar canon of construction to construe a contract, if it may consistently be done, to be effective, rather than ineffective."

### POINT III.

ALL THAT IS NECESSARY TO TAKE A CONTRACT OUT OF THE OPERATION OF THE STATUTE OF FRAUDS IS THAT THE ESSENTIAL ELEMENTS OF THE CONTRACT BE EXPRESSED IN WRITING AND SIGNED BY THE PARTY TO BE CHARGED.

In the case of Bartlett-Heard Land & Cattle Co. vs. Harris, (Ariz.) supra, the Court stated on Page 329:

"Now no particular form of language or instrument is required. Any document, written either to evidence a contract or for any other purpose,

is enough, if it states all the essential elements of the contract with reasonable certainty and is signed by the party to be charged or his agent."

#### POINT IV.

SUBDIVISION 7 OF SECTION 58-101 ARIZONA CODE ANNOTATED, 1939, WITH THE CONSTRUCTION PLACED UPON IT BY THE CALIFORNIA COURTS WAS LIFTED FROM THE LAW OF CALIFORNIA AND SUCH CONSTRUCTION IS CONTROLLING HERE.

Prior to 1913, the Arizona statute of frauds contained no provision requiring that a real estate broker's contract be in writing. An action could at that time be maintained on a parole contract. Friedman vs. Suttle, 10 Arizona. 57, 85 Pac. 726.

Although the original Arizona statute of frauds came from Texas, Murphy vs. Brown, 12 Ariz. 268, 100 Pac. 801, subdivision 7 of Section 58-101 Arizona Code Annotated 1939, undoubtedly was lifted from the California statute. It was passed at the 2nd Special Session of the First Legislature in Arizona and made its first appearance as subdivision 7 of Section 3272 of the 1913 Arizona Civil Code.

The language of the Arizona provision is almost identical with that of California. See subdivision 6, Sec. 1624, California Civil Code, set forth in Kennedy vs. Merickel (Cal.), 97 Pac. 81, at page 82.

The Arizona Supreme Court stated in the case of Brought vs. Howard, 30 Ariz. 522, 249 Pac. 76, that subdivision 8 of Section 3272, 1913 Ariz. Civil Code, "was lifted bodily from the California law." Said subdivision 8 was enacted by the same session of the first Arizona legislature that enacted subdivision 7 and made its first appearance in the Arizona law in Section 3272 of the 1913 Arizona Civil Code along with said subdivision 7.

In Murphy vs. Smith, 26 Ariz. 394, 226 Pac. 206, at page 207 the Arizona Supreme Court stated that said "subdivision 7 of Section 3272 is, for the purposes of this case, identical with subdivision 6 of Section 1624 California Civil Code." In view of these circumstances, there is no doubt that this particular subdivision 7 came from California.

It is a well established rule in Arizona that a statute adopted from another state will be presumed to have been adopted with the construction previously placed upon it by the courts of that state. Henrietta Mining & Milling Co. vs. Gardner, 173 U. S. 123, 19 S. Ct. 327, 42 L. Ed. 637. It has also been held that such construction is controlling, Territory vs. Copper Queen Consolidated Mining Co., 13 Ariz. 198, 108 Pac. 960, affirmed 233 U. S. 87, 34 S. Ct. 546, 58 L. Ed. 863.

In view of the fact that the courts of Arizona have not decided the question involved in this case, the liberal construction placed upon this particular statute by the courts of California and in existence at the time the statute was adopted by Arizona should govern and control here.

## POINT V.

SAID WRITINGS CONTAIN ALL OF THE ESSENTIAL ELEMENTS OF THE AGREEMENT AND ARE SUFFICIENT TO TAKE THE AGREEMENT OUT OF THE OPERATION OF THE STATUTE OF FRAUDS.

It is therefore proper to examine the letters and telegrams between the parties to ascertain if there can be found therein sufficient memoranda to take the alleged contract out of the operation of the statute of frauds.

The correspondence between the parties covers the period from January 8, 1942, through December 10, 1943.

The first letter is one from the appellant to the Appellee of January 8, 1942, which refers to former correspondence (T. 14) about a listing upon the Appellant's

"360 acres of land here in Section 31, Township 2 North, Range 2 East."

On February 2nd, 1942, Appellant wrote Appellee asking if he would consider

"taking two 40's in on trade or if not if" he "would consider selling 160 acres of it and at what price." (T. 14 & 15).

On February 4th, 1942, Appellee wrote Appellant (T. 15)

"I certainly would not be interested in taking two small pieces unless I could get them for less than their market value."

This is a good ranch and a property involving considerable money."

Appellant telegraphed Appellee an offer of \$90,000.00 cash for his 360 acres (T. 21), to which Appellee replied on March 12, 1943, by telegram:

"Thanks for offer. Not enough now. Will be over the first of April. See you then." (T. 22).

These excerpts from the correspondence leave no doubt whatever that the real estate was 360 acres of land belonging to the Appellant located in Section 31, Township 2 North, Range 2 East, Maricopa County, Arizona. This is more than sufficient to measure up to the requirements as to the identity of the real estate.

Pray v. Anthony (Calif.)  
- 274 Pac. 1024.

Needham v. Abbott Kinney Co. (Calif.)  
17 Pac. 2nd 109.

That the Appellee intended to pay the regular broker's commission of 5% on any sale made by Appellant is equally apparent from the correspondence.

In his letter of March 6, 1942, (T. 18), Appellant states:

"However, we would have to be assured that in the event we forced a sale to Smith to match our offer that we would be paid our 5% commission."

Again in Appellant's letter of June 12, 1943, (T. 28)

"Leo expects to make the offer less the commission and then sell some part of it off. I was in hopes that you would not mention who was bidding on the place since it gives him a good opportunity to talk them out of it, since most of the neighbors do not care to bid against a \$5,000.00 handicap."

In Appellee's letter to Appellant of July 7, 1943, (T. 30) he states:

"I repeat, what I told you in Phoenix, that you are the only broker who will be allowed to do anything on it. If I decide to put it in anyone else's hands, I shall give you ample time to work out anything you may have in mind. At this time you are the only firm who knows I would consider selling at all."

To this letter, the Appellant replied on July 10, 1943 (T. 32):

"I appreciate your kindness to us in not putting the place in other broker's hands and I

know that you are very fair-minded. However, the fact remains if the place is sold for \$300.00 per acre it will be due to our efforts in a large measure and I think that we have come nearer earning the commission than Leo has."

In Appellee's letter, dated Saturday, 18th, which evidently is in response to Appellant's telegraphic request for an answer to his wires of September 20th and October 8th, 1943, Appellee states: (T. p. 44):

"and Morse get this straight, no one ever worked on my affairs, or did me a favor that he didn't get just compensation for it, so take it easy and keep your eyes and ears open for a proposition that will bring us both in an honest dollar or two."

Appellee could not have possibly understood anything other than that Appellant intended to receive a 5% commission on the sale. He confirms this understanding by his silence and by continuing to encourage the Appellant to obtain offers for the purchase of the property and by advising Appellant he will not place the property in the hands of any other broker without giving Appellant ample time to work out anything he may have in mind and finally by telling Appellant that no one ever worked on his affairs who did not get just compensation for it.

There is no issue involved in this appeal as to whether or not the Appellant performed the agreement. We are concerned solely with the issue as to whether or not there is sufficient memorandum in writing to show that Appellee employed appellant.

The following excerpts from the correspondence show very definitely that the Appellee authorized and empowered the Appellant to sell his property.

On February 4th, 1942, Appellee wrote Appellant (T. 15) :

"This is a good ranch and a property involving considerable money. If you have a buyer definitely interested and willing to pay the market price for it, let me have an offer that is a business one."

On February 16, 1942, Appellee wrote Appellant (T.17) :

"I shall be over soon; at which time I will look you up. In the meantime if you have a deal that you think will interest me, let me know.

However, as the picture looks at this time I won't consider anything less than two hundred net. So unless you have a buyer that wants to pay a good price don't waste your time on this deal.

The best way to get me to sell is to offer me another piece that I can profitably buy. I am willing to trade at any time."

On March 12, 1943, Appellee telegraphed Appellant in response to an offer submitted to him by Appellant: (T. 22) :

"Thanks for the offer. Not enough now. Will be over the first of April. See you then."

On May 31, 1943, Appellee wrote Appellant: (T. 25)  
"I might be able to work out a combination deal on it, that is, if you sell my other place."

On July 7, 1943, Appellee wrote Appellant: (T. 30)

"I repeat, what I told you in Phoenix, that you are the only broker who will be allowed to do anything on it. If I decide to put it in anyone else's hands I shall give you ample time to work out anything you may have in mind. At this time you are the only firm who knows I would consider selling at all.

"There is this angle. I am not raising the price on the place at this time, but six months from now the picture may be quite different. Price changes are moving very rapidly just now. But know you understand that angle.

"If you should develop something that is a deal shoot me a letter on it. I will do my best to work it out for you."

Appellee states in his letter of Saturday, the 18th: (T. 43 & 44).

"On the matter of the deal: I understand just about what you are thinking, and from your point of view you have a right to think that I am a hell

of a guy to do business with. However I shall not attempt to do anything until I am in Phoenix. Of course this may well cost me more by several times than I am making here, and yet damned if I can get away.

The trade your party has sounds as if I might want it, but again, I can make no decision until I see it.

"It is not clear to me that your party will definitely buy. I think you know all there is to know about that place, and the lease. Will your party make a definite offer and put up some earnest money to bind it, for the property, subject to the lease, and for delivery on a certain date. In short, is this a deal or is it a prospect. If it is a prospect I will not feel too badly if we delay for another week or ten days. If you have the deal ready to close I will cut my time in the San Joaquin as short as possible and get there a few days earlier. Write me a line at this address and they will send it on up to me, or better still send it to my Visalia address.

"And Morse get this straight no one ever worked on my affairs, or did me a favor that he didn't get just compensation for it, so take it easy and keep your eyes and ears open for a proposition that will bring us both in an honest dollar or two."

The language set forth in the letters and telegrams written by the Appellee to the Appellant and set forth above is not ambiguous or uncertain as to meaning. It is perfectly plain and clear and the Appellant was justified in interpreting the language to mean exactly what it said.

These letters and telegrams were written by the owner of a piece of real estate to a real estate broker. The owner requested the broker to obtain an offer for the sale of his property on at least three different occasions. He acknowledged and recognized Appellant as his broker and assured him he would "give" him ample time to work out anything "if he decided to put it" in other hands. The real estate broker obtained offers and submitted them to the owner who rejected them because they were not large enough. All this took place after the owner knew that the broker was expecting the owner to pay the regular 5% commission if he sold the property.

In the case of Curran vs. Hubbard (Calif.), 114 Pac. 81, a broker received the following communication from a real estate owner:

"Ontario, December 6-08. My orange grove is lot 645, Ontario Colony. My price is \$12,000. Get me an offer. O. H. Hubbard, 3526 S. Figueroa St."

The court there stated:

"The memorandum should be considered as a whole, and thus considered it clearly appears

therefrom that defendant described his property, stated the price upon the basis of which he would sell or exchange, and, by the words 'get me an offer', used in the memorandum delivered to plaintiff, intended to and did authorize and employ him to find someone to whom a sale or satisfactory exchange could be made. Any other interpretation would be meaningless. \* \* \* The memorandum was a sufficient compliance with the statute, and showed that plaintiff was employed by defendant to make a sale or satisfactory exchange of defendant's property, and not merely to procure a single offer of purchase or exchange. The words 'employed plaintiff to find an offer', as used in the finding, are susceptible of no other interpretation than that plaintiff was employed to find a satisfactory offer—one which defendant was willing to or did accept."

Did not the Appellee acknowledge that the Appellant was authorized to act as his agent for the purpose of selling his property when he stated: (T. 30).

"I repeat, what I told you in Phoenix, that you are the only broker who will be allowed to do anything on it. If I decide to put it in anyone else's hands I shall give you ample time to work out anything you may have in mind."

Could there have possibly been any doubt in the Appellee's mind as to the authority of the Appellant to negotiate a deal for him when he wrote the Appellant: (T. 44).

"If you have the deal ready to close I will cut my time in the San Joaquin as short as possible and get there a few days earlier."

In the case of Kennedy vs. Merickel (Calif.) 97 Pac. 81, the Court says.

"A writing signed by the owner and addressed to the broker expressly or impliedly acknowledging his authority to act as agent for the purposes of the sale is a sufficient compliance with the statute. The purpose of the statute being to prevent the assertion of false claims for compensation by brokers and agents against owners of real estate, which was possible under the old rule, it is sufficient if it be shown that the party to be charged has recognized the broker as his agent by a writing subscribed by him."

In a later California case Cowing v. Wofford, 229 Pac. 883, at page 884, the Court stated in regard to the California statute:

"Under the code provisions the chief element is the employment. It is not requisite that the memorandum should be an instrument by the terms of which the agent is empowered to so bind the principal as to support an action for specific performance."

Appellant does not contend that the Appellee placed this property in his hands and authorized him to sell

it without submitting the deal to the Appellee for his approval. On the other hand, Appellant does contend that Appellee authorized him to obtain and negotiate a deal for the sale of the property, which would be acceptable to the Appellee; that such a deal was made; that Appellee agreed to it with the purchaser with whom the Appellant had negotiated the deal; that afterwards the Appellee went back on the proposition he had accepted, and refused to pay the Appellant for the services he had rendered. However, as stated before, the question of performance on the part of Appellant is not here involved. The sole question here is whether or not these letters constitute sufficient memorandum of the Appellant's authority to negotiate a deal for the sale of Appellee's property subject to the Appellee's approval.

The Circuit Court of Appeals of the Eighth Circuit recognized the settled construction of this statute in California in the case of *McCartney v. Clover Valley Land & Stock Co.*, 232 Fed. 697 (C.C.A. 8th) 1 A.L.R. 1127. There the Court states:

“The writing which it demands may be embodied in letters and telegrams. All that is necessary is that the fact of employment be expressed in writing, signed by the party to be charged, or by his agent.”

All that was necessary in California at the time Arizona lifted this particular section from its code was that the fact of employment be expressed in writing,

signed by the party to be charged. Certainly that fact appears in Appellee's letters.

These writings express all of the essential elements of the contract. They more than measure up to the requirements of the statute.

It is submitted that the holding of the learned District Court that the writings contain no memorandum in writing signed by Appellee of the promise or agreement alleged in Plaintiff's amended complaint is erroneous and does violence to the plain and unambiguous language of Appellee's letters and the ordinary and orderly way of business transactions by mail.

HILL, ROBERT & HILL,

By Ronald White  
405 Luhrs Tower,  
Phoenix, Arizona.  
Attorneys for Appellant.

Three copies of the foregoing Appellant's Opening Brief were served on me this.....day  
of....., 1945.

.....  
Attorney for Appellee.

No. 10974

---

IN THE  
United States  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

---

E. J. HEBETS,

Appellant,

vs.

BENSON G. SCOTT,

Appellee.

---

BRIEF OF APPELLEE

---

BLAINE B. SHIMMEL  
317 Title & Trust Bldg.,  
Phoenix, Arizona  
Attorney for Appellee

---

THE MESSENGER PRINTING CO., PHOENIX, ARIZONA

FILED

JUL 2 - 1945

PAUL P. O'BRIEN,  
CLERK



## **TOPICAL INDEX**

	Pages
Appellee's Statement of the Case under Rule 56.....	1
Summary of Argument.....	4
Argument .....	4
Conclusion .....	23

## TABLE OF AUTHORITIES CITED

### *CASES*

	Page
Black v. Milliken, 143 Wash. 204, 255 Pac. 101.....	21
Curran v. Hubbard, 114 Pac. 81.....	18
Great Western Land Co. v. Waite, 171 Pac. 193 (former opinion 168 Pac. 927).....	22
Henry v. Harker, 61 Ore. 226, 122 Pac. 298....	9, 21
Jacobs v. Copp, 123 Ohio State 146, 174 N. E. 353.....	21
Johnson v. Whalen, 13 Okla. 320, 74 Pac. 503	22
Kennedy v. Merickel, 8 Cal. App. 378, 97 Pac. 81.....	20
Loefler v. Friedman, 57 New York NYS 281, 26 Misc. Rep. 750.....	22
Moore v. Borgfeldt, 96 Cal. App. 906, 273 Pac. 1114.....	20
Morrill v. Barneson, 86 Pac. (2d) 924.....	18-20
Muney v. Thompson, 26 Cal. App. 634, 147 Pac. 1178.....	20
Oregon Home Builders v. Crowley, 87 Oreg. 517, 170 Pac. 718, 171 Pac. 214.....	21

Ryan v. Ball, 177 S. W. 226.....	22
Thomas v. Maryfield, 7 Kans. App. 669, 53 Pac. 891.....	22
Wienhouse v. Croon, 68 Conn. 250, 36 A. 45....	22
Zimmerman v. Zehendner, 164 Ind. 466, 73 N. E. 920, 3 Ann. Cases 655.....	20-21

## STATUTES

Section 58-101, Arizona Code Annotated, 1939.....	2, 4
(Arizona Statute of Frauds)	



No. 10974

---

---

IN THE  
United States  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

---

E. J. HEBETS,

Appellant,

vs.

BENSON G. SCOTT,

Appellee.

---

BRIEF OF APPELLEE

---

APPELLEE'S STATEMENT OF THE  
CASE UNDER RULE 56

Supplementing Appellant's statement of the case and the basis of jurisdiction, Appellee desires only to show that the summary judgment rendered by the

District Court was properly bottomed on applicable provisions of Rule 56.

Appellant's amended complaint (T. 6) states a claim, first, for a broker's 5% commission and, second, the reasonable value of his services (in the same transaction) in connection with the production of a purchaser for Appellee's real estate. It alleges that a memorandum of the express promise upon which the action was brought was in writing and signed by Appellee (T. 7).

The answer expressly denies the existence of such a memorandum in writing (T. 10). It affirmatively alleges that no memorandum of the promise alleged in the quantum meruit cause of action was ever in writing, signed by Appellee (T. 11).

The Arizona statute of frauds, Section 58-101, Arizona Code Annotated, 1939, set forth on page 5 of Appellant's Brief, prescribes an action "upon an agreement authorizing or employing an agent or broker to \* \* \* sell real property \* \* \* for compensation or a commission \* \* \* unless the promise or agreement \* \* \* or some memorandum thereof shall be in writing and signed by the parties to be charged therewith, or by some person by him thereunto lawfully authorized." Accordingly, the issue raised at the outset was whether there was a memorandum of the alleged promise or agreement, in writing, signed by defendant or some person by him lawfully authorized.

To dispose initially of this controlling issue, the parties produced, on order of court pursuant to Rule 34, all of the writings, written or received by them "in the premesis" (T. 13, 56). These consisted of the documents, numbered 1 to 43, inclusive, attached to Appellee's Motion for Summary Judgment (T. 14-54); and, by formal stipulation (T. 55), the parties submitted these instruments as all of the writings by or between them "in respect of the promise or agreement alleged in plaintiff's amended complaint."

Upon this record, and pursuant to Rule 56 (b), Appellee moved for summary judgment (T. 12); asserting that, upon the pleadings and the admissions of the stipulation on file, there was no genuine issue as to the material fact of the existence, nature or extent of the memoranda relied upon by appellant; the sole issue being one of the sufficiency of such memoranda to represent an actionable promise or agreement. Upon this issue, Appellant claimed judgment as a matter of law.

Having considered the 43 documents stipulated to comprise all the written evidence adducible in respect of the promise or agreement relied upon, the District Court found, as a fact, that they contained no memorandum in writing signed by defendant, or any person by him thereunto lawfully authorized, of any promise or agreement alleged in the amended complaint; from which finding, the Court concluded that the claims alleged in the amended complaint

are, and each of them is, barred by the provisions of Section 58-101, A.C.A. 1939, and ordered summary judgment for defendant (T. 59).

### SUMMARY OF ARGUMENT

The writings relied upon to satisfy the statute of frauds (T. 14-54), contain no promise or agreement, or any memorandum thereof, signed by Appellee, employing or authorizing Appellant to sell his land. On the contrary, they expressly negative such an employment; and both Appellant, himself, in concluding the correspondence, and his counsel, in closing their brief, interpret the writings as comprising, at most, a conditional agreement, far from the one alleged in their amended complaint, and of which no evidence at all is contained in the writings.

### ARGUMENT

We will not contest Points 1, 2 and 3 of Appellant's Summary of Argument (Brief, 7-8). Nor will we, in respect of Point 4 (Brief, 8), bother to trace the derivation of the Arizona statute of frauds. Whether it was "lifted from California" is quite immaterial, since Appellant's brief points out no distinctive construction in California of the alleged antecedent statute, and our examination of California decisions discloses none. The sole point to be argued, then, is whether the writings signed by Appellee, or anything contained in them, constitute or contain an employment of Appellant to sell Appellee's land

for a commission or compensation, or any memorandum thereof.

The amended complaint alleges that "on or about June 1, 1943, plaintiff (Appellant) was employed by defendant (Appellee) to procure a purchaser for real estate," describing it (T. 6); and that "a memorandum of such promise and agreement \* \* \* was in writing and signed by the said defendant" (T. 7). This is the express *employment* alleged, and the only promise or agreement alleged in the first cause of action. The second cause of action alleges that "on or about the 20th day of September, 1943, plaintiff performed services for defendant, at his request" in the negotiation of a sale of the same real estate. The writing first alleged is denied (T. 10); and the answer alleges that no memorandum of the alleged request was ever signed by Appellee (T. 11).

The 43 writings (T. 14-54), among which the employment must be found, comprise 41 letters and telegrams between Appellant, a Phoenix, Arizona, realtor, or his associates, McNamara and Morse, and Appellee, a resident of San Diego, California. (Number 30 is an Agreement for Exchange, and Number 34 a Purchase Contract, each unexecuted by Appellee). This correspondence commenced on January 8, 1942, ended December 10, 1943. Of the 41 communications, only 12 were from Appellee to Appellant, and of these 12, 4 were purely formal, leaving only 8 documents seriously to be examined for the alleged promise over Appellee's signature.

Before discussing these particular instruments, or the correspondence as a whole, we want, first, to show the interpretation placed upon them by Appellant. On November 15, 1943, long after the alleged agreement, Appellant's broker, Morse, who conducted most of the correspondence, undertook to summarize the transaction. After reviewing what had transpired, he said to Appellee, "We took the above to be a 'gentlemen's agreement' \* \* \*" We will hereinafter discuss this term, and what the courts have made of it. Here we submit it as a glass, furnished by the author of most of the writings, through which they may properly be viewed.

More significant still is the final contention made by counsel, in their opening brief. After alleging an express agreement of employment, and a promise to pay a 5% commission (T. 6-7), and arguing, for 22 pages, that isolated passages from Appellee's letters establish one, they conclude with a reversal of position, amounting to a plain confession of error. They say, pages 22-3:

"Appellant does not contend that Appellee placed this property in his hands and authorized him to sell it without submitting the deal to the Appellee for his approval. On the other hand, Appellant does contend that Appellee authorized him to obtain and negotiate a deal for the sale of the property, which would be acceptable to the Appellee; that such a deal was made; that Appellee agreed to it with the purchaser with

whom the Appellant had negotiated the deal; that afterwards the Appellee went back on the proposition he had accepted, and refused to pay the Appellant for the services he had rendered."

(Brief, 22-23)

Of course, this kind of a conditional "authorization" is not at all what the amended complaint alleged. Just as clearly, it is not the "agreement authorizing or employing Appellant to sell real property for compensation or a commission" described in Appellant's First Specification of Error (Brief 6). And it is an entirely different agreement from the one sought to be developed on page 17 of the Opening Brief, where Appellant quotes "excerpts from the correspondence" to "show very definitely that the Appellee authorized and empowered the Appellant to sell his property." Down to the penultimate page of his brief, the entire position of Appellant is that Appellee had expressly authorized him, in writing, to sell his property, on specified terms, for a 5% commission. Then it is suddenly conceded that the prerequisite agreement in writing was only an authorization to submit a deal for Appellee's approval; "to obtain and negotiate a deal for the sale of the property \* \* \* which would be acceptable to the Appellee."

We have, at this early stage, pointed out these admissions of Appellant, before analyzing the writings, because we want to show the Court just what

sort of a promise or agreement should be sought among Appellee's writings. From the pleadings, the stipulation, and down to page 23 of Appellant's brief, we should be looking for an authorization by the owner to the realtor to sell real estate for a commission. We are fairly sure, in advance, that such a commitment will not be found, because, first, Appellant, in concluding the correspondence, says it is, at most, a "gentlemen's agreement" (T. 50); and further, because, in concluding their brief, counsel admit that all they discover among the writings is an authorization "to obtain and negotiate a deal which would be acceptable to Appellee" (Brief 23). We can be absolutely certain that this sort of a promise will not be found, because Appellant makes no attempt to point out where it is contained or implied. He goes on (page 23) to claim "that such a deal was made; that Appellee agreed to it with the purchaser \* \* \*," and afterwards "went back on the proposition." But he cites no word of the record to show even an allegation of this improvised theory and, of course, there is none.

Having in mind these two possibilities to be sought, let us now examine the writings. Do they contain a memorandum, signed by Appellee, of a promise or agreement employing Appellant to sell his land for compensation? Documents 1 to 43 comprise 40 pages of the record (T. 14-54). We will try to avoid argument based upon isolated sentences, without reference to explanatory context. At page 21, Appel-

lant's brief aptly illustrates the impropriety of this practice. It is there argued that Appellee acknowledged employment of Appellant by writing:

"I repeat, what I told you in Phoenix, that you are the only broker who will be allowed to do anything on it. If I decide to put it in anyone else's hands I shall give you ample time to work out anything you may have in mind."

(Brief, 21)

Standing alone, this does seem to imply that Appellee's property had been put in Appellant's hands, but the succeeding sentence:

"At this time, you are the only firm who knows I would consider selling at all."

indicates clearly enough that all *any* realtor knew was that Appellee would *consider* selling, and assuredly negatives any authorization to sell.

In *Henry v. Harker*, 61 Ore. 226, 122 Pac. 298, the Supreme Court of Oregon, on rehearing, adopted a suggestion by counsel that the extensive correspondence there urged as comprising a written authorization from owner to realtor, be paraphrased as a "written conversation between the parties." This Oregon case is close to this one in many respects, particularly in that the realtor concluded by pleading a "gentlemen's arrangement." Treated as such a written conversation, the correspondence here may fairly be boiled down to this:

## Document No.

1. *Realtor:* If your land is for sale we would like a listing on it.
2. *Realtor:* I have a party interested in your place. Will you consider a trade?
3. *Owner:* Perhaps you have the wrong impression of this property. I am not trying to sell it. If you have a buyer definitely interested and willing to pay the market price, let me have an offer that is a business one.
4. *Realtor:* I think I understand your position, but nevertheless urge a deal.
5. *Owner:* I will see you when I come to Phoenix; in the meantime, if you have a deal you think would interest me, let me know.
6. *Realtor:* We have an eastern buyer here. Talked with your tenant, Leo Smith, and told him you weren't much interested in selling; he says he has an option on the place. We might get you \$225.00 per acre, but would have to be assured we would get 5% commission if we forced a sale to Smith.

(With this, the 1942 correspondence, January 8th to March 26th, concluded. It was not re-

sumed until March, 1943. (T. 21).

9. ) *Realtor:* Have offer \$90,000.00 cash for your
10. ) 360 acres. Wire or phone collect.
11. *Owner:* Thanks for offer. Not enough now.  
See you in April.
12. *Realtor:* I appreciate you are not offering  
your property for sale. Have a buyer  
who wants to offer \$235.00 per acre,  
and would like you to reconsider and  
give me a definite expression.
13. *Realtor:* Would like definite price for at least  
ten days.
17. *Realtor:* Your tenant says he will bid against  
anyone making an offer for your  
place. I was afraid of this.
18. *Realtor:* Have two prospects. Awaiting letter.
19. *Owner:* I have a moral obligation to Smith,  
and will write him. In the meantime,  
just let the deal simmer. I repeat,  
what I told you in Phoenix, that you  
are the only broker who will be al-  
lowed to do anything on it. If I de-  
cide to put it in anyone else's hands,  
I shall give you ample time to work  
out anything you have in mind. At  
this time you are the only firm who

knows I would consider selling at all. If you should develop something that is a deal, shoot me a letter on it. I will do my best to work it out for you. I will give you a letter as soon as I have an answer from Leo Smith.

20. *Realtor:* I appreciate your position with Smith. Also appreciate your kindness in not putting the place in other brokers' hands. But if the place is sold for \$300.00 per acre, we will have come nearer earning the commission than Smith. I will put up \$100.00 I can sell your place within thirty days from the time you give us a definite commitment.
21. *Realtor:* Have one Kendall interested in your place. Let me hear from you.
24. *Realtor:* Kendall has offered a trade for your place. Think he may pay cash. Let me hear which deal you prefer.
25. *Realtor:* Let me hear from you as to offer.
27. *Realtor:* No word from you. Please give us something definite.
28. ) *Realtor:* Kendall has signed trade agreement.  
29. ) Will even be interested in buying.  
Come over at once.

31. *Realtor:* Wired you offer. When may we expect you over?
32. *Realtor:* Please answer wire. We need you here.
33. *Owner:* Can't come now, and shall not attempt to do anything until I am in Phoenix. The trade your party has sounds as if I might want it, but again, I can make no decision until I see it. Is this a deal or is it a prospect? If a deal ready to close, I will come over as soon as possible. And Morse, get this straight, no one ever worked on my affairs, or did me a favor, that didn't get just compensation for it; so take it easy, and keep your eyes and ears open for a proposition that will bring us both in an honest dollar or two.
34. *Realtor:* Purchase contract and deposit receipt signed by Kendall; to be binding only when signed by purchaser and seller. (Paragraph Fourth, T. 46.)
35. *Realtor:* Please do not delay longer than necessary. Nervous strain has put Morse in the hospital.
36. *Owner:* Can't get report until next week. Will wire then.

37. *Realtor:* Have had Kendall's \$10,000 deposit for twenty days. Still nothing definite from you. We thought we had a "gentlemen's agreement" with you. You are not treating us right to ignore our telegrams and this offer.
38. *Realtor:* Kendall wants acknowledgment of his acceptance your proposition on ranch.
39. *Realtor:* Advise coming over immediately to close deal.
40. *Owner:* Your letters and wires received. I cannot accept your proposition, but have delayed answer, hoping the picture would change. It hasn't at this writing. Can't get to Phoenix before next month. I am not trying to sell this place through or to anyone. My inability to close a deal hasn't the remotest connection with anyone in Arizona, the price of land, or World War II. When I can give you any other news I will write you.
41. *Realtor:* Advise by wire when you can deliver.
42. *Realtor:* If price a factor, believe Kendall would pay \$325.00 per acre, if we

could have definite assurance you would close deal. Advise what can be done.

43. *Owner:* Thanks for offer. Price no deciding factor. Impossible to make deal. See you when I come over.

We believe the foregoing paraphrase fairly and accurately reflects all that was written between these parties, and fairly emphasizes all commitments over the signature of Appellee. Before applying to these writings the rules laid down by courts in construing other situations, we want to point out the following outstanding features of the documents here under consideration:

1. All statements respecting price, terms, amount of commission, and such necessary elements of the alleged promise or agreement, are found exclusively in communications from the realtor; not in those signed by the party sought to be charged.
2. In his first letter, the realtor solicited a "listing" of the owner's land. A listing is well known to be a formal, written instrument, authorizing the realtor to sell on specified terms. Throughout the correspondence, this realtor repeatedly sought something definite. On April 7, 1943, he specifically requested a "definite price for at least ten days" (T. 24). As late as July 10, 1943 (forty days after the date of the pleaded employment (T. 6), he was

offering to bet \$100.00 he could sell the land "within thirty days from time you give us definite commitment" (T. 32).

3. In his very first reply, the owner cautioned the realtor against the wrong impression. "I am not trying to sell it" (T. 15). This position the realtor said he fully appreciated, in 1942 (T. 16), and again in 1943 (Document 12, T. 22).

4. Until after the owner had finally declined to "accept your proposition at this time" (T. 52), the realtor had at all times referred to his submissions as "offers." Down to November 15, 1943, when he stated his interpretation of the "gentlemen's agreement," his only complaint was that the owner was not "treating us right in ignoring our telegrams and this offer." "This offer" was the Kendall proposal, on which Appellant had then had a deposit "since October 25th" (T. 49).

In our view, all that transpired between these parties should fairly be characterized as diligent pursuit, and persistent submission of offers by the realtor, with full knowledge that the owner was not trying to sell, but would, at most, "try to work out for you" any deal which might be developed. Surely, the realtor never, at any time, acted like a broker with an authorization to sell. Even when he had Kendall's signature and deposit, he submitted the proposal, not as a consummation of his authorization, but as an offer (T. 49).

This conclusion is so inescapable as to have impressed even Appellant's counsel. Manifestly, it was their inability to find, in all the writings producible, any support for the promise or agreement they had pleaded and argued to the last page of their brief, which led them, at the end, to abandon that position and fall back on a nebulous authorization to submit a deal for Appellee's approval—one which "would be acceptable to the Appellee" (Brief, 23).

They go on then to argue "that such a deal was made; that Appellee agreed to it with the purchaser with whom the Appellant had negotiated the deal;" and that Appellee afterwards "went back on the proposition." We agree that the question of performance of the alleged employment is not here involved; all that was raised by the Motion for Summary Judgment was the existence of any memorandum signed by Appellee of the promise or agreement pleaded. Having pleaded and proceeded to the end of his brief on one theory, Appellant may not then shift to another. Of course, the statement "\*\*\* that Appellee agreed to it with the purchaser with whom the Appellant had negotiated the deal \*\*\*" is pure fabrication. The record is that when the Kendall offer was submitted, Appellee's only response was that he "couldn't accept your proposition at this time" (T. 52). But to sustain the summary judgment rendered below, it is only necessary to point out:

1. That the employment pleaded is admittedly

not shown in writing; and

2. That the conditional employment "subject to the Appellee's approval" was not pleaded, relied upon, or even conceived, until the first contention proved itself untenable.
- 

Of the sixteen cases cited in Appellant's brief, all but one are directed to elementary principles of construction with which we have no particular quarrel. Only one, *Curran v. Hubbard* (California Court of Appeal), 114 Pac. 81, is offered to measure a particular writing by the statute of frauds. There, an owner wrote his broker:

"Ontario, December 6-08. My orange grove is lot 645, Ontario Colony. My price is \$12,000. Get me an offer. O. H. Hubbard, 3526 S. Figueroa St." 114 Pac. 81.

The holding that this satisfies the statute of frauds is about as liberal a construction as we find among the hundreds of decisions upon varying states of facts. Obviously, it goes far beyond anything set down by this Appellee. Owner Hubbard did not preface his direct solicitation of an offer with a disclaimer of any desire to sell. Nor did he add that, on receipt of an offer, he would try to work out a deal. For a recent California case, illustrative of many construing a single document, see *Morrill v. Barneson*, 86 Pac. (2d) 924, where a broker relied

on this seemingly complete written authorization:

"256 Montgomery Street San Francisco, California July 29, 1936 Mr. George E. Morrill 116 Hamlet Street Los Angeles, California Dear Sir: Answering your recent inquiry at my brother's office in Los Angeles concerning the sale of Bailey Ranch, following is the information requested. The ranch consists of approximately 3800 acres. The elevation in general is about 3500 feet, and does not extend into the desert. A copy of the legal description is enclosed, and I think the foreman has a plat at the ranch, which can be seen. Price \$50,000, including between 500 and 600 head of cattle. Terms \$30,000.00 cash, balance payable \$5,000.00 annually, with interest at 6%. The regular 5% commission will be paid. The foreman of the ranch is Mr. Ed Rutledge, and he will show the place. Very truly yours, (signed) Lionel T. Barneson."

86 Pac. (2d) 925.

Of this language, the District Court of Appeal said:

"\* \* \* The letter relied upon contains no terms of employment; it was simply an answer to an inquiry concerning the property. The expression in the letter 'The regular 5% commission will be paid,' was nothing more than additional information concerning the terms of sale and informed the broker of the exact amount for which

the property could be purchased. That the letter did not constitute an employment is well established by the authorities." 86 Pac. (2d) 925.

There is no California rule, liberal or otherwise, as referred to, without citation of authority, at page 12 of Appellant's brief. But examination of California cases does disclose that there is one distinctive feature in that State. California appears to be the only state possessing a statute of frauds similar to Arizona's, in which the memorandum in writing is not required to contain a statement of the amount of the commission promised to be paid. The following California cases so hold:

*Kennedy v. Merickel*, 8 Cal. App. 378,  
97 Pac. 81;

*Muncy v. Thompson*, 26 Cal. App. 634,  
147 Pac. 1178;

*Moore v. Borgfeldt*, 96 Cal. App. 906,  
273 Pac. 1114.

In practically every other state where the statute is silent as to the necessity of stating the amount of the commission in the memorandum, it is held that this is an essential part of the contract of employment and that if it does not appear, the memorandum is insufficient, even though it shows an employment. The earliest case, and probably the leading one on this question, is that of *Zimmerman v.*

*Zehendner*, 164 Ind. 466, 73 N. E. 920, 3 Ann. Cases 655. This has been followed in *Jacobs v. Copp*, 123 Ohio State 146, 174 N. E. 353; *Black v. Milliken*, 143 Wash. 204, 255 Pac. 101; *Oregon Home Builders v. Crowley*, 87 Oreg. 517, 170 Pac. 718, 171 Pac. 214.

While there is no Arizona decision on this precise point, by the weight of authority the memorandum must express not only the employment, but the amount of commission payable. This Appellee made no mention of any commission in any writing, but since his writings fail to establish the employment itself, we will not elaborate the finer point.

Nor will we ask the Court to compare many of the numerous cases construing memoranda in writing. We have already cited *Henry v. Harker*, an Oregon case involving an extensive exchange of letters remarkably parallel to those here under consideration. As in the present case, the Oregon broker concluded by charging a breach of a "gentlemen's arrangement." The lengthy correspondence is set out in the first opinion, 118 Pac. 205; digested as a "written conversation" in 122 Pac. 298. The Supreme Court of Oregon applied the following language, readily applicable here:

"\* \* \* We do not have presented to us the case of a property owner anxious to sell and seeking a broker to act for him, but rather an active and enterprising broker seeking to induce an indifferent owner to allow him to sell

his property on commission."

Another Oregon decision, *Great Western Land Co. v. Waite*, 171 Pac. 193 (former opinion, 168 Pac. 927), is devoted entirely to construing seven letters between owner and broker. Although the statute there involved required the entire contract to be in writing, the case is applicable upon this Appellant's contention that Appellee confirmed the alleged understanding by his silence (Brief, 16). We submit the following statement of the Oregon court as equally controlling here:

"Moreover, as we have shown, the plaintiff approached the owner in the character of a buying broker and agent, acting and proposing to act for a party not disclosed. There is nothing in the writings on either side showing that the defendant ever assented to any change of front on the part of plaintiff." 171 Pac. 194.

As closely analogous under similar statutes, we cite, without discussion, *Loefler v. Friedman*, 57 New York NYS 281, 26 Misc. Rep. 750; *Thomas v. Maryfield*, 7 Kans. App. 669, 53 Pac. 891; *Ryan v. Ball* (Tex.), 177 S. W. 226; *Johnson v. Whalen*, 13 Okla. 320, 74 Pac. 503, and *Wienhouse v. Croon*, 68 Conn. 250, 36 A. 45.

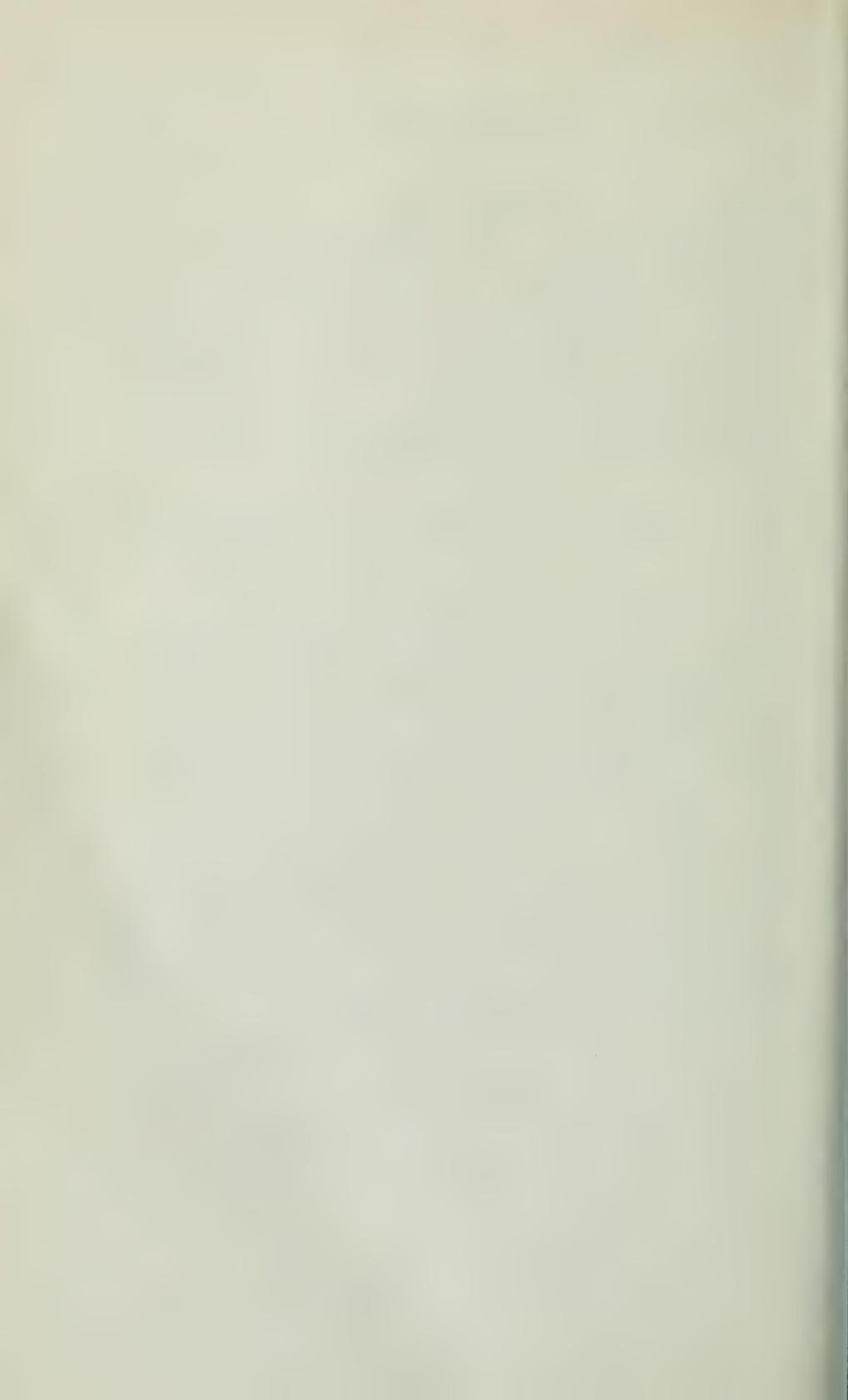
## CONCLUSION

The point, and the sole point, relied upon by Appellant on this appeal is that Documents 1 to 43, inclusive, "constitute a sufficient memorandum of an agreement authorizing and employing plaintiff (Appellant) as a broker to sell real property to take the said agreement out of the operation of the statute of frauds \* \* \*" (T. 64, 69).

The parties having stipulated that said documents comprise all the evidence of such a memorandum, there is no issue as to any material fact, and the point appellant elected to rely upon raises only a question of law for the Court. Upon that question of law, we submit that the District Court correctly ordered summary judgment, which should be here affirmed, because the documents signed by Appellee negative, rather than establish, the promise or agreement alleged; of which the best proof is that all Appellant can sift out of the writings is a "gentlemen's agreement"; all his counsel can make of them is an "if-and-when" agreement, neither pleaded nor relied upon, but conspicuously disproved by the writings themselves.

Respectfully submitted,

BLAINE B. SHIMMEL  
317 Title & Trust Building,  
Phoenix, Arizona  
Attorney for Appellee.



No. 10974

---

---

IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

E. J. HEBETS,

*Appellant,*

vs.

BENSON G. SCOTT,

*Appellee.*

---

APPELLANT'S REPLY BRIEF

---

HILL, ROBERT & HILL  
Attorneys for Appellant  
310 Luhrs Tower  
PHOENIX, ARIZONA

FILED

AUG 24 1945

PAUL P. O'BRIEN,  
CLERK

---



## **TOPICAL INDEX**

Summary .....	1
The California Decisions .....	2
The Correspondence Is More Than a Mere Solicitation .....	7
Has Appellant Shifted His Theory? .....	9

**TABLE OF AUTHORITIES CITED  
CASES**

	Page
Curran vs. Hubbard (Calif.), 114 Pac. 81.....	2, 3, 4
Great Western Land Co. vs. Waite 171 Pac. 193 and 168 Pac. 927 .....	8
Henry vs. Harker, 61 Ore. 226; 122 Pac. 298.....	8
Kennedy vs. Merickel (Calif.) 97 P 81 .....	5
McCartney vs. Clover Valley Land & Stock Com- pany (C.C.A. 8th) 232 Fed. 697 .....	6
Moore vs. Borgfeldt, 96 Calif. App. 306; 273 Pac. 1114 .....	6
Morrill vs. Barneson (Cal.) 86 Pac. 2nd 924.....	6, 7
Toomey vs. Dunphy, 86 Cal. 639, 25 P 130 .....	6
Wiggim vs. Shouse (Kan.) 185 Pac. 896 .....	14
Zeligson vs. Hartman-Blair Inc. (C.C.A. Kan.) 135 Fed. 2nd 874 .....	14

IN THE  
United States  
**Circuit Court of Appeals**  
For the Ninth Circuit

---

E. J. HEBETS,

*Appellant,*

vs.

BENSON G. SCOTT,

*Appellee.*

---

APPELLANT'S REPLY BRIEF

---

SUMMARY

Appellee admits that a contract binding under the Statute of Frauds may be gathered from letters, writings and telegrams between the parties. He admits that the Statute of Frauds is merely a rule of evidence and that a contract will be construed if it may consistently be done to be effective rather than ineffective under the Statute of Frauds. He admits that all that is necessary to take a contract out of operation of the Statute of Frauds is that the essential elements of the contract be expressed in writing and signed by the party to be charged.

By not bothering to trace the derivation of the provision of the Statute of Frauds which he has invoked here, he admits that such Statute was lifted from California and that the Statute, as construed by the courts of California, will govern in Arizona.

He argues that there is no distinctive construction in California of the Statute here invoked in its application to the facts.

He argues that the correspondence between the broker and owner is nothing more than a proposal by a broker to an owner that he act as the owner's agent and he cites two Oregon cases to support this view.

He argues that the Appellant has shifted his position from reliance on an express authorization in writing to sell, to that of a "conditional employment subject to Appellee's approval".

#### *The California Decisions*

Appellee says of this Statute: "No distinctive construction in California" has been pointed out "and our examination of California decisions discloses none". (Brief 4). Then later (Brief 18) he discusses the case of Curran vs. Hubbard, 114 Pacific 81, a California case which was cited and quoted from by Appellant. He dismisses this case with the statement that,

"Obviously, it goes far beyond anything set down by this Appellee. Owner Hubbard did not

preface his direct solicitation of an offer with a disclaimer of any desire to sell. Nor did he add that, on receipt of an offer, he would try to work out a deal."

What legal difference there is, between a listing given after solicitation and one given without solicitation we fail to see and Appellee fails to point out. The important thing is: was there a listing, was there an authorization from the owner to the broker to negotiate a sale?

His distinction is far fetched and weak when it is analyzed. Appellee relies upon a disclaimer of a desire to sell made February 4, 1942 (T. 15) some 15 months prior to the time he acknowledged that Appellant was his broker, in May and July, 1943 (T. 25 and 30) and after an offer of \$90,000 had been submitted to and rejected by him (T. 21 and 22) and after other deals had been submitted in August and September, 1943 (T. 33, 36, 39 and 40) to which he replied:

"The trade your party has sounds as if I might want it, but again, I can make no decision until I see it (T. 44).

Appellee knew for over 18 months after he had disclaimed a desire to sell, that Appellant, had, at his request for offers, been devoting time and effort to the sale of the property and yet he now has to go back to the disclaimer to find a distinction between this case and the case of Curran vs. Hubbard (Supra).

There is no distinction between the two cases. The important thing in the Curran vs. Hubbard case (Supra) as stated by the court is:

"defendant \* \* \* by the words 'get me an offer' used in the memorandum delivered to plaintiff, intended to and did authorize and employ him to find someone to whom a sale or satisfactory exchange could be made. Any other interpretation would be meaningless". 114 Pacific, page 82.

Here Appellee wrote Appellant "if you have a buyer definitely interested and willing to pay the market price for it, *let me have an offer*, that is, a business one" (T. 15); again "I shall be over soon; at which time I will look you up. In the meantime if you have a deal that you think will interest me, *let me know* (T. 17); again "if you should develop something that is a deal, *shoot me a letter on it*" (T. 30 and 31); and again "if you have the deal ready to close I will cut my time in the San Joaquin as short as possible and get there a few days earlier. *Write me a line* at this address and they will send it on up to me, or better still send it to my Visalia address". (T. 44) (Italics Ours).

In the Curran vs. Hubbard case (Supra), there was only one request from the owner to the broker to obtain an offer; here there are three such requests and in addition a request that he be kept advised of the progress of the negotiations that he knew were in progress. Indeed, the facts here are much stronger than they were in the Curran vs. Hubbard case.

Appellant also cited and quoted from the case of Kennedy vs. Merickel 97 Pacific 81. That is a California case which construes the Statute invoked here. It unmistakably holds that:

"A writing signed by the owner and addressed to the broker expressly or impliedly acknowledging his authority to act as agent for the purpose of the sale is a sufficient compliance with the statute". 97 Pacific 82 and 83.

Appellee completely dodges this case, obviously because its holding is unanswerable. Appellee in his letter of May 31, 1943 (T. 25) states: "I might be able to work out a combination deal on it, that is, if you sell my other place". On July 7, 1943 (T. 30) he said "I repeat, what I told you in Phoenix, that you are the only broker who will be allowed to do anything on it. If I decided to put it in anyone else's hands I shall give you ample time to work out anything you may have in mind."

In spite of Appellee's feeble effort on page 9 of his brief to make this language into something different from what it actually is, it still means exactly what it says. It is an unqualified acknowledgment that the Appellant was the Appellee's broker for the purpose of selling the property and a promise that he would not terminate the agency without giving the broker a chance to work out any deals he may have been working on. This alone, under the rule of Kennedy vs. Merickel (Supra), is sufficient memorandum to meet the requirements of the Statute.

Appellee has overlooked or disregarded the case of McCartney vs. Clover Valley Land and Stock Company (C. C. A. 8th) 232 Fed. 697 which is cited on pages 9 and 23 of Appellant's Brief and quoted from on the latter page. In that case the Court stated in regard to the California statute:

"all that is necessary is that the fact of employment be expressed in writing, signed by the party to be charged, or by his agent."

Appellee has also overlooked in his search of the California cases Toomey vs. Dunphy 86 Cal. 639 25 Pac. 130 and Moore vs. Borgfeldt 96 Cal. App. 306, 273 Pac., 1114. These two cases are cited and the latter is quoted from in the case of Morrill vs. Barne-  
son 86 Pac. 2nd 924, which is the only California case Appellant cites and quotes from (Brief 18, 19, and 20).

In the first of these cases, Toomey vs. Dunphy, the writing under consideration was.

"Henry Toomey can arrange for the sale of my ranch in Nevada as per within memorandum".

This language was held to express the fact of em-  
ployment and sufficient to meet the requirements of  
the Statute.

In the second case, Moore vs. Borgfeldt (*Supra*),  
the following quotation is taken from that case and  
appears in the opinion of Morrill vs. Barneson (which  
is the case relied on by the Appellee):

"As we have pointed out, the writing need not be a complete contract, but only a note or memorandum, provided it shows authority to act. When this requirement is met in connection with a definite piece of property, the other terms may be shown by parol. The amount of compensation, and even an agreement to pay a commission, may be so shown." 86 Pac. 2nd 927.

The best distinction between the holding of the case of Morrill vs. Barneson (which is the California case Appellee relies on) and this case is that made by the court itself. It is stated on page 927 of the opinion;

"Several cases have been cited to us by Appellant, but it is not necessary to review the same. *The cases expressly request the agent to get an offer.* It is well settled that a memorandum to be sufficient under the Statute of Frauds must show an authority to act, i.e., authority to negotiate a sale on defendant's behalf. If such authority appears, then the identity of the agent, and even the agreement to pay him, may be shown by parol". (Italics Ours).

In that case, Barneson, the owner, did not request Morrill to obtain an offer for his ranch. Here there are three such requests.

#### *The Correspondence Is More Than a Mere Solicitation*

In support of his proposition that the correspondence constitutes nothing more than a solicitation by a

broker for authority to act as such, Appellee relies upon two Oregon cases, Henry vs. Harker 61 Ore. 226, 122 Pac. 298, and Great Western Land Company vs. Waite 171 Pac. 193 first opinion 168 Pac. 927.

In the first of these cases the question of whether or not the correspondence was sufficient to meet the requirements of the Oregon Statute of Frauds was neither raised as a defense nor determined by the court. The case was decided on the proposition that the broker had not earned his commission because he had not sold the property in accordance with the terms prescribed by the owner or with the approval of the owner.

The very fact that the Statute of Frauds was not urged as a defense is conclusive that both parties and their counsel were of the opinion that the writings were sufficient to take the agreement out of the operation of the Oregon Statute of Frauds, of which the Oregon court has said "it is the most drastic of its kind in the United States". Great Western Land Company vs. Waite 168 Pac. 927 (which is the other Oregon case Appellee relies on).

That case has no application here because it did not decide the question involved and because the Oregon Statute is vastly different from the Arizona Statute.

The other Oregon case, Great Western Land Company vs. Waite, (Supra) is clearly distinguishable; there the broker,

"approached the owner in the character of a buy-

ing broker and agent acting and purporting to act for a party not disclosed. There is nothing in the writings on either side showing that the defendant ever assented to any change of front on the part of plaintiff". 171 Pac. 194.

The above quotation appears on page 22 of Appellee's Brief. Here the whole correspondence indicates conclusively that the broker was carrying out the repeated requests of the owner to obtain offers for the purchase of his property from anyone the broker could get an offer from.

In this latter Oregon case the correspondence contains no request by the owner to the broker to obtain offers of purchase for his property. The owner merely wrote the broker as to the terms on which he would sell and agreed to protect the broker in the sale for anything over \$15.00 net per acre to the owner. There is nothing in the correspondence where the owner acknowledged the broker as his agent. The case is further distinguishable on the basis that the Oregon Statute is "the most drastic of its kind in the United States" and completely different from the Arizona Statute.

#### *Has Appellant Shifted His Theory?*

Appellee overlooks no opportunity to accuse the Appellant of having shifted his position and changed his theory of this case.

Again and again, Appellee attempts to brand the Appellant with abandonment of his original theory

and a reversal of his position. He states (Brief 4) "and his counsel, in closing his brief, interpret the writings as comprising, at most, a conditional agreement, far from the one alleged in their amended complain". On page 6 he states "After alleging an express agreement of employment, and a promise to pay a 5% commission, and arguing, for 22 pages, that isolated passages \* \* \* \* establish one, they conclude with a reversal of position, amounting to a plain confession of error". On page 1 he states "Down to the penultimate page of his brief, the entire position of Appellant is that Appellee had expressly authorized him, in writing, to sell his property on specified terms for a 5% commission. Then it is suddenly conceded that the prerequisite agreement in writing was only an authorization to submit a deal for Appellee's approval". On page 17 he states "Manifestly, it was their inability to find, in all the writing producible, any support for the promise or agreement they had pleaded and argued to the last page of their brief, which led them, at the end, to abandon the position and fall back on a nebulous authorization to submit a deal for Appellee's approval" and again on the same page "Having pleaded and proceeded to the end of his brief on one theory, Appellant may not then shift to another" and again on page 17 and continuing on page 18, "But to sustain the summary judgment rendered below, it is only necessary to point out:

1. That the employment pleaded is admittedly not shown in writing, and
2. That the conditional employment 'subject to the

Appellee's approval' was not pleaded, relied upon, or even conceived, until the first contention proved itself untenable."

This is rather strong language and a serious accusation, if correct. On the other hand, if it is not substantiated by the record, then it must be an attempt to obscure the issues so as to permit Appellee to escape through a "hole in the fence" in the confusion.

Appellant alleged in his amended complaint that "plaintiff was employed by defendant to procure a purchaser for real estate owned by defendant" \* \* \* \* and "in consideration thereof defendant promised and agreed to pay plaintiff \* \* \* \* a commission." That "a memorandum of such promise and agreement upon which this action is brought was in writing and signed by defendant" \* \* \* \* that "plaintiff negotiated the sale of said land" \* \* \* \* "upon the terms and conditions fixed and agreed upon by the defendant" \* \* \* \* that the purchaser procured by the plaintiff was willing, ready and able to complete the purchase of defendant's real estate upon the terms and conditions fixed and agreed upon by the defendant; that the plaintiff performed all the conditions of the contract and that the defendant refused to pay him the commission. (T. 6 and 7).

If Appellee was misled into believing that he was being sued upon an express formal agreement; he could not have been long in the dark. All of the correspondence was made available to the Appellee under

an order of the court on May 22, 1944. (T. 56) and he attached all of it to his motion for a summary judgment. (T. 13). With all of the evidence on which Appellant relied to establish a sufficient memorandum to take the agreement out of the operation of the Statute of Frauds in his hands; there could be no doubt in Appellee's mind as to what he was being sued for or as to the position or the theory of the Appellant.

Certainly had there been a formal written agreement, Appellant would have sued upon that agreement and not upon an agreement, a memorandum of which was in writing and signed by Appellee. Had such a formal written agreement existed the Appellee could not have claimed immunity because of the Statute of Frauds.

Too, it appeared from the correspondence that at least one offer had been submitted to Appellee for the purchase of property and that the Appellee had turned the offer down. (T. 21 and 22). In addition to this it appears that Appellant telegraphed and wrote Appellee that he had a proposition (T. 35 and 36) to which Appellee replied on September 3, 1943 he would be over next week (T. 38). Again on September 20th Appellant advised Appellee by letter (T. 39) that he had signed up a client on a trade agreement and that the client would be interested in buying even if Appellee didn't want to trade, that "there is a deal either way if taken care of in time", and later

he telegraphed Appellee that he had a definite deal signed up "if trade not suitable, will arrange deal cash or terms as required by you". (T. 40) to all of which Appellee replied (T. 44) "the trade your party has sounds as if I might want it, but again I can make no decision until I see it".

With all of this correspondence before him, it is difficult to understand how the Appellee or his counsel could misunderstand the plaintiff's theory of this case. Appellant's position is now and always has been as it was originally: that the Appellee employed the Appellant to act as his broker to obtain an offer of purchase for his property that would be satisfactory to him; that Appellant did this and that Appellee after accepting the offer went back to California and refused to go through with the deal he had made.

There is nothing strange, mysterious or unusual about an owner employing a broker to obtain an offer for his property which is subject to the owner's approval and acceptance. If the broker, under such an employment, produces a purchaser whose offer is accepted by the owner, then certainly the broker has earned his commission. That is, and always has been, the Appellant's theory. The appellee has known all along that, that was the theory of Appellant's case. The record shows it has not been changed or shifted.

This leaves only two matters we desire to briefly cover.

First: we challenge Appellee's definition of "a listing", (Brief 5) and in support of this challenge cite

the cases of Zeligson vs. Hartman-Blair, Inc. (C. C. A. Kan.) 135 Fed. 2nd 874 and Wiggam vs. Shouse (Kan.) 185 Pac. 896.

Second: Appellee fails to make good on his promise "to discuss the term 'gentlemen's agreement' and what the courts have made of it". (Brief 6). We understand that it is an agreement between gentlemen. We understand gentlemen are men of honor and integrity. They are men who in their dealings with others can honestly state "and Morse get this straight no one ever worked on my affairs, or did me a favor that he didn't get just compensation for it" (T. 44). Morse was certainly mistaken when he took the agreement with Appellee for a "gentlemen's agreement" (T. 50).

It is respectfully submitted that this case should be reversed.

HILL, ROBERT & HILL,  
By ROULAND W. HILL  
Attorneys for Appellant  
310 Luhrs Tower  
Phoenix, Arizona.

**No. 10975**

IN THE

**United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT**

---

LAWRENCE HAZARD,

Appellant,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a Corporation; WALTER PIDGEON; LORETTA YOUNG; YOUNG & RUBICAM INC., a Corporation; and GOODYEAR TIRE & RUBBER CO., INC., a Corporation,

Appellees.

---

**TRANSCRIPT OF RECORD**

Upon Appeal from the District Court of the United States  
for the Southern District of California,

Central Division

---

**FILED**

APR 23 1945

**PAUL P. O'BRIEN,  
CLERK**



**No. 10975**

**IN THE**

**United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT**

---

LAWRENCE HAZARD,

Appellant,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a Corporation; WALTER PIDGEON; LORETTA YOUNG; YOUNG & RUBICAM INC., a Corporation; and GOODYEAR TIRE & RUBBER CO., INC., a Corporation,

Appellees.

---

**TRANSCRIPT OF RECORD**

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

---



## INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italics* the two words between which the omission seems to occur.]

	Page
Answer of Defendants Columbia Broadcasting System, Inc., et al.....	33
Exhibit A. Agreement Between Lawrence Hazard and Columbia Pictures Corporation.....	36
Answer of Defendant Goodyear Tire & Rubber Co., Inc. .....	43
Appeal:	
Notice of .....	255
Order Approving Record on, etc.....	257
Stipulation re Record on.....	256
Certificate of Clerk.....	258
Complaint for Infringement of Copyright.....	3
Exhibit 2. Copy of Radio Adaptation of Copyrighted Dramatic Composition.....	7
Exhibit 1 for Identification. Form of Assignment.....	241
Findings of Fact and Conclusions of Law.....	250
Judgment .....	254
Memorandum Opinion .....	248
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	255
Order Approving Record on Appeal and Certifying Same to the Circuit Court of Appeals.....	257

	Page
Reporter's Transcript of Proceedings on Trial.....	227
Statement of Points on Which Appellant Relies on Appeal .....	260
Stipulation of Facts.....	44
Exhibit A. Screen Play and Dialogue of Motion Picture Entitled "A Man's Castle".....	47
Exhibit B. Agreement Between Columbia Pictures Corporation and Walter Pidgeon.....	224
Stipulation re Record on Appeal.....	256
Summons .....	2

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

LOEWENTHAL & ELIAS

J. ROBERT ARKUSH

633 Roosevelt Building

Los Angeles 14, Calif.

For Appellees:

MITCHELL, SILBERBERG & KNUPP

GUY KNUPP

603 Roosevelt Building

Los Angeles 14, Calif. [1\*]

\*Page number appearing at foot of Certified Transcript.

[Title of District Court and Cause.]

## SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon Loewenthal & Elias, plaintiff's attorneys, whose address 633 Roosevelt Building, Los Angeles 14, California, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal of Court]

EDMUND L. SMITH

Clerk of Court.

By John A. Childress

John A. Childress

Deputy Clerk.

Date: March 27, 1944 [2]

In the District Court of the United States for the  
Southern District of California,  
Central Division

Civil Action No. 3527-B. H.

LAWRENCE HAZARD,

Plaintiff,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation; WALTER PIDGEON; LORETTA YOUNG; YOUNG & RUBICAM INC., a corporation; GOODYEAR TIRE & RUBBER CO., INC., a corporation; Company One, a corporation; Company Two, a corporation; Company Three, a corporation; Company Four, a co-partnership; Company Five, a co-partnership; Company Six, a co-partnership; First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe and Eighth Doe,

Defendants.

COMPLAINT FOR INFRINGEMENT OF  
COPYRIGHT

To the Honorable Judges of Said Court:

Plaintiff complains of defendants as follows:

I.

Jurisdiction in this cause is founded upon Section 34 of the Copyright Laws of the United States of America, being Title 17 U. S. C. A., Section 34.

II.

For many years last past plaintiff has been and now is a resident of the County of Los Angeles, State of California. [3]

**III.**

Defendant Columbia Broadcasting System, Inc. is a corporation, duly organized under the laws of the State of New York, and qualified to do business in the State of California. Defendant Goodyear Tire & Rubber Co. Inc. is a corporation, duly organized under the laws of the State of Delaware, and qualified to do business in the State of California. Defendant Young & Rubicam Inc. is a corporation, duly organized and qualified to do business under the laws of the State of California.

**IV.**

Defendants Company One, a corporation, Company Two, a corporation, Company Three, a corporation, Company Four, a co-partnership, Company Five, a co-partnership, Company Six, a co-partnership, First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe and Eighth Doe are sued herein under fictitious names for the reason that plaintiff does not know their true names, but when said true names are ascertained by plaintiff, plaintiff will ask leave of court to substitute said true names for the fictitious names herein used.

**V.**

Prior to May 28, 1932, plaintiff, who was then and ever since has been a citizen of the United States, created and wrote an original dramatic composition entitled "A Man's Castle." Said dramatic composition has not been reproduced in copies for sale.

**VI.**

Said dramatic composition contains a large amount of material wholly original with plaintiff and was and is copyrightable subject matter under the laws of the United States.

## VII.

On or about May 28, 1932, plaintiff complied in all respects with the provisions of the Copyright Act of 1909 as amended, and particularly with the provisions of Section 11 of said Act, and [4] all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said dramatic composition, and received from the Register of Copyrights a certificate of registration dated and identified as follows: "May 28, 1932, Entry: Class D2 No. 16584."

## VIII.

Since May 28, 1932, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyright in said dramatic composition, save and except that Columbia Pictures Corporation of California, Ltd. has a license with respect to the motion picture rights in and to said dramatic composition.

## IX.

After May 28, 1932, and within one year last past, defendants infringed said copyright by preparing and producing a radio adaptation of said copyrighted work and by vending manuscripts and records thereof, and by making and procuring the making of transcriptions and records thereof, by and from which the same may be exhibited, performed, represented, produced, and reproduced, and by exhibiting, performing, representing, producing and reproducing the same. That defendants' said radio adaptation was entitled "A Man's Castle" and was copied largely from plaintiff's said copyrighted dramatic composition.

## X.

A copy of plaintiff's dramatic composition is attached hereto as Exhibit 1 and hereby made a part of this

complaint. A copy of defendants' radio adaptation of plaintiff's said copyrighted dramatic composition is attached hereto as Exhibit 2 and hereby made a part of this complaint.

Wherefore, plaintiff prays:

(1) That defendants, their agents and servants be [5] enjoined during the pendency of this action and permanently from infringing said copyright of plaintiff in any manner.

(2) That defendants be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendants' infringement of said copyright and to account and pay over to plaintiff all the gains, profits and advantages derived by defendants and each of them from their infringement of plaintiff's copyright, or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than two hundred fifty dollars (\$250).

(3) That defendants be required to deliver up to be impounded during the pendency of this action all copies, transcriptions, records and other matter in their possession or under their control or under the possession or control of any of them infringing said copyright.

(4) That defendants pay to plaintiff the costs of this action and reasonable attorneys' fees to be allowed to plaintiff by the court.

(5) That plaintiff have such other and further relief as is just.

LOEWENTHAL & ELIAS

By T. J. Elias

Attorneys for Plaintiff [6]

[Verified.] [7]

EXHIBIT 2 TO PLAINTIFF'S COMPLAINT

[Title of District Court and Cause.]

[118]

"THE STAR AND THE STORY"

Sunday, February 20, 1944      5:00 – 5:30 PM, PWT.

---

REED: Goodyear—the greatest Name in Rubber—

MUSIC: (Introduction and Down:)

REED: The Star--Loretta Young—and the story "A Man's Castle"—and your host, Walter Pidgeon, with the music of Alfred Newman, brought to you by the Goodyear Tire and Rubber Company.

MUSIC: (First Four Bars of Main Theme . . . Then)

REED: The public benefits because—

MUSIC: (String)

VOICE ONE: It's a forward-looking company—

MUSIC: (String)

VOICE TWO: It's versatile—

MUSIC: (String)

VOICE THREE: It leads in Research—

MUSIC: (String)

VOICE FOUR: It's a company of great resources—

MUSIC: (String)

REED: It's Goodyear, the greatest name in rubber, giving you the greatest names in entertainment.

MUSIC: And here is your Goodyear host, Walter Pidgeon.

(Applause) [119]

"The Star and the Story"

-1-

2/20/44

Pidgeon: Good evening, ladies and gentlemen, I'm very proud of the opportunity of presenting to you tonight's star, Loretta Young. Loretta is one of Hollywood's busiest actresses, and I'm happy that she has found time to be with us tonight. The story is "A Man's Castle" in which Loretta Young plays the part of "Trina" and I play her rather strange companion, "Bill."

Alfred Newman, music if you please.

MUSIC: (Story Theme . . . Perhaps a Variation on "Brother Can You Spare a Dime" in a Minor Key . . . Fades Behind:)

REED: The newspapers called it the "Depression"—remember? Still—if it hadn't been for this sorry state of affairs, Bill and Trina might have never met. We find them seated on opposite ends of a park bench. Bill is immaculate in evening clothes, opera hat and cane, Trina is neatly but shabbily dressed—and there is a desperate, almost hysterical look in her eyes as she watches him toss popcorn to flocks of birds at his feet . . .

SOUND: Cooing of Pigeons

BILL: Hey, look—you at the end of the bench—will you stop lookin' at me like that? Maybe you don't like birds but they got to eat same as anyone else.

TRINA: Please—

BILL: Come on—spill it. What's the matter with you?

TRINA: Nothin'. Just let me—

BILL: What's the rush?

TRINA: Please—please let me go or I'll—I'll . . .

BILL: You'll what?

TRINA: I'll get down on my hands and knees for some of that popcorn. [120]

*"The Star and the Story"* -2-

BILL: Look—what is this?

TRINA: I ain't eat'n in two days.

BILL: Why not?

TRINA: I haven't any money.

BILL: Neither have the birds but they eat—regular.

TRINA: It must be great to be a bird.

BILL: If you had half the brains of one of those birds you wouldn't go hungry. Come on—let's go and eat.

MUSIC: (Up . . . Quick Sequel Into Dance Tune of Early 30's . . . Fades Behind)

WAITER: Will there be anything else, sir?

BILL: No, I guess not. Just tell the manager I want to see him.

WAITER: The Manager? (Fading) Yes, sir.

BILL: Y'know they oughta let you eat in the front window. It'd bring 'em a lot of trade. I never saw a half-pint who could put away food like you can.

TRINA: When you've been outa work a whole year you get so's you're hungry most of the time.

BILL: That's no excuse. You're a girl. All you got to do is walk up to some guy and say, "Look, Mister, how about stakin' me to a meal?"

TRINA: Oh, I couldn't ever do that.

BILL: Too proud, huh? Maybe you'd rather jump in the river?

TRINA: I thought of that. This afternoon. But I was afraid.

BILL: How you ever going to get places if you're afraid of everything?

TRINA: I guess I won't ever get anywhere. It's all right for you not to be afraid. You've got everything—clothes—money— [121]

"The Star and the Story" -3-  
2/20/44

MANAGER: (Fade In) Excuse me, sir—you wished to see me?

BILL: You the manager?

MANAGER: Yes, sir—if there's anything wrong—

BILL: No—everything's fine . . . except for the fact that there's twelve million people out of a job—

MANAGER: Yes, sir, but what—

BILL: And a lot of 'em are starving. Now take this young lady, for instance—up until an hour ago she hadn't eaten for two days. I brought her in here and fixed her up. She feels swell. The food was great.

MANAGER: Thank you. I'm sure that—

BILL: The only trouble is she ain't got a cent.

MANAGER: What?

BILL: And neither have I.

MANAGER: What? If this is your idea of a joke—

BILL: Now wait a minute. This joint throws out enough left-over grub in a week to feed a thousand people. You can put what she ate on the cuff an' not lose a cent.

MANAGER: This is an outrage. I'll call—

BILL: Am I right or wrong? I'll tell you what I'll do. I'll put it up to your own customers.

MANAGER: Please. Not so loud.

BILL: (Loud) Ladies and gentlemen—

MANAGER: Stop!

BILL: (Continuing) According to the newspapers, the banks are full of gold, the granaries are bursting with grain, and yet there's twelve million people—

Manager: (Loud Threatening) Get out. Get out of here—both of you! [122]

"The Star and the Story" -4-  
2/20/44

BILL: Okay, buddy. (To Crowd:) Pardon the interruption, folks--the case is dismissed.

AD LIB: (Laughs)

MUSIC: (Up . . . Hold for a Moment . . .  
Fade Out)

SOUND: Traffic Noises . . . Footsteps.

BILL: There's nothing' like a good walk after dinner. Besides—I get paid for it.

TRINA: Paid for just walkin'?

BILL: That's right.

TRINA: But, why?

BILL: Close your eyes a second.

TRINA: All right.

BILL: Okay—open 'em up.

TRINA: (In Surprise) Ohhhhhh!

BILL: Pretty swell, huh?

TRINA: It's beautiful!

BILL: Yeah! This looks like an ordinary dress-shirt—but when I press this button, the neon letters light up an' say, "Buy Gilsey House Coffee" . . .

TRINA: You look just like a Christmas tree. Can I push the button once?

BILL: Sure . . . They give me the clothes an' two bucks a night . . . Hey—take it easy! you want to burn out the battery?

TRINA: I'm sorry . . . Is this your regular job?

BILL: Nah! I don't believe in regular jobs. Say—what's your name?

TRINA: Trina.

BILL: Yeah. Well—I guess I'll just call you "whosits."

TRINA: What's yours? [123]

"The Star and the Story" -5-

BILL: Bill.

TRINA: Bill.

BILL: Well, I got to get to work.

TRINA: Is it all right if I walk along with you?

BILL: It's a free country, ain't it? Come on. Soon's it's time to quit I'll find you a place to sleep for the night.

Music: (Up . . . Transition . . . Fades)

BILL: Well—this is it, Whoosits. Vagville-on-the-Hudson. The fastest growin' community of bums, pan-handlers and down-and-outers in the East. How'd you like it?

TRINA: It's swell. A house is a house, I guess, even if it is made out of packing boxes and old tin.

BILL: You said it. I figure you can sleep at Ira's.

TRINA: Ira's?

BILL: Yeah. He's a sky-pilot who moved down here to uplift the bums—earns his coffee an' cakes by bein' night watchman at the toy factory.

TRINA: Yes, but don't you think—

BILL: Come on—that's him sittin' over there in the door readin' . . . (Footsteps on Gravel)

IRA: (Fading in as They Approach) . . . and seeing the multitudes. He went up into the mountain and His disciples came unto Him and He taught them saying, "Blessed are the—

BILL: Hello, Ira.

IRA: Uh? . . . Oh, hello, Bill.

BILL: What time you go to work?

IRA: Eleven-thirty. [124]

"The Star and the Story" -6-  
2/20/44

BILL: Okay. The young lady'll check in your house about twelve. She hasn't got a place to sleep.

IRA: She's very welcome to stay here.

TRINA: Thank you. I don't know how I can ever . . .

BILL: Forget it—Come on, Whoosits. So long, Ira . . . (Footsteps)

IRA: (Fading) So long, Bill . . . And He taught them saying, "Blessed are the poor in spirit for theirs is the . . .

TRINA: He . . . Ira, I mean . . . He's awfully nice, isn't he?

BILL: The best. Funny—when people got nothin' they act like human beings. We get along fine down here—like one big happy family.

BRAGG: (Off) Go on—get out of here, you cheap moocher, before I slap you down!

BILL: Yeah—not countin' that guy—he just moved in last week.

FLOSSIE: (Off) I want my money—you promised it to me!

BRAGG: (Off) Go on—beat it!

BILL: Hold it, Bragg. What goes on, Flossie?

FLOSSIE: He owes me some dough, Bill—an' he won't pay.

BRAGG: A coupla measley smacks! I'll give it to her when I get it.

BILL: Maybe Flossie needs it right now. Here you are, Flossie—I'll pay off for Bragg.

FLOSSIE: Thank ya, Bill. (Fading) I got a right good use for it believe me.

BILL: Now you owe me the two bucks, Bragg--and I'm the kind of guy that can collect.

BRAGG: Okay—I'm good for it, ain't I? . . . Say—who's your friend? How about an intro? [125]

"The Star and the Story" -7-  
2/20/44

BILL: She ain't your type—so don't go gettin' ideas.

BRAGG: You got the exclusive on it?

BILL: I could have.

BRAGG: Well, if you ain't, I'd like to make a bid.

BILL: Come on, Whoosits—let's mosey along. It kinda smells bad around here. It might be the air an' then again it might be the company.

SOUND: Footsteps

BRAGG: (Fading) Any time he throws you over, just give me a call, Sister. I can be real entertainin' when I put myself out.

TRINA: I—I don't like him . . . do you, Bill?

BILL: That mug? Listen—he don't even like himself. Here—let's go down by the river. It's real pretty at night when you can't see the garbage scows.

MUSIC: Up . . . Then Fade Out . . . Leaving an Accordian Playing Softly in the Distance . . .

TRINA: It's just like a picture . . . the moon . . . the water . . . look . . . it makes a path.

BILL: Uh-huh.

TRINA: I wonder where you'd get to if you could walk right out on that path . . . and keep walkin' an' walkin' . . . I wonder where you'd get to?

BILL: That's easy. You'd get to the moon.

TRINA: It's so quiet . . . and those ships out there look so kinda peaceful and contented like.

BILL: G'wan. They been lyin' there for years rottin' away with barnacles. That's what you get when you're anchored. [126]

"The Star and the Story"

-8-

2/20/44

TRINA: Still in all it's restful, Bill.

BILL: Sure. So's a graveyard.

SOUND: Mournful Note of Train Whistle off . . .

TRINA: What . . . What was that?

BILL: Train whistle. Tracks are right over there.

TRINA: It's scarey . . . kinda . . .

BILL Naaaa! They're what I like best about this place. They remind me of other places.

TRINA: Places you'd like to go to?

BILL: Places I'm gonna go to. You'll never catch me settlin' down in one burg. I gotta keep movin'—just like those trains. You know what those whistles say to me?

TRINA: What?

BILL: They say, "Gangway! Get out of my way! Here I come." You know where I'd like to go?

TRINA: Mom told me Atlantic City was real beautiful. She an' Pop went there on their honeymoon.

BILL: (In Disgust) Atlantic City! I wanna go to Rio. I met a little South American tomato once—an's was she able.

TRINA: I—I guess you've had lots of girls, haven't you?

BILL: Sure. I got one now that'd knock your eye out. A blonde.

TRINA: Oh.

BILL: Natural. Her name's Fay La Rue.

TRINA: Does she live down here?

BILL: Look—do you think I run around with tramps? [127]

"The Star and the Story" -9-  
2/20/44

TRINA: I didn't mean—

BILL: Fay's in a big show on Broadway. Lives in a swell apartment on the avenue.

TRINA: Oh . . . I guess she's pretty crazy about you, huh?

BILL: She says I'm the kind of guy that's easy to meet an' hard to forget.

TRINA: Yeah—Yeah I guess so.

BILL: Say—say, it's gettin' late. I gotta shove off.

TRINA: You mean—you mean you got to go somewhere tonight?

BILL: Sure—I got a date to meet Fay after her show . . .

TRINA: Can I go with you?

BILL: With me? Are you nuts? What would she say?

TRINA: But I can't stay here alone! I'd be scared!

BILL: You're always scared!

TRINA: No, I'm not—

BILL: You're scared of everything in the whole world!

TRINA: No—no, I'm not scared of you, Bill.

BILL: Well, you better be! Ah' when I tell you to do somethin'—you better step, see?

TRINA: Yes, Bill.

BILL: You go up to Ira's an' go to bed—you hear?

TRINA: Yes, Bill.

BILL: I'll see you in the morning' an' stake you to breakfast.

TRINA: Yes, Bill.

BILL: Okay. (Fading) Goodnight, whoosits.

TRINA: Goodnight Bill . . . goodnight.

MUSIC: (Transition . . . Fades Down . . . Out)

SOUND: Door Opens . . . Closes [128]

"The Star and the Story" -10-  
2/20/44

BRAGG: Hello, Trina. All alone by your lonesome?

TRINA: You better get out of here, Bragg!

BRAGG: What for? Ira never told me to keep out.

TRINA: Well Bill has. He told you two weeks ago  
to leave me alone.

BRAGG: Yaa! He's too busy with that Broadway  
blonde to bother about you. I sen 'em together just this  
mornin'!

TRINA: Well supposin' you did? I ain't got no  
claim on Bill.

BRAGG: Sure you ain't. An' did you ever hear how  
he talks about you? Always crabbin' about how skinny  
you are.

TRINA: Well—I am skinny.

BRAGG: No, you ain't. (Softly) Not what I call  
skinny . . . you're slim . . . just right.

TRINA: You better get right out of here, Bragg.

BRAGG: I got better eyes than Bill . . . why, you  
got a swell shape . . . soft . . . curvy . . .

TRINA: Let go of me!

BRAGG: Aw, honey, wait now.

TRINA: If I tell Bill—he'll kill you, he will! He  
toldja, didn't he? He toldja if you ever—

(Door Opens) Bill!

BILL: Hey—what goes on here?

BRAGG: Nothin’—nothin’ at all, Bill.

BILL: Didn’t I warn you this shack was outa bounds?

BRAGG: Sure—but I only dropped by to pass the time. I thought maybe Trina was lonesome—you leavin’ her alone so much.

BILL: When she is, I’ll let you know. Until I do— [129]

“The Star and the Story” -11-  
2/20/44

BRAGG: Look—what right you got to set yourself up so high an’ mighty?

BILL: That’s my business.

BRAGG: Yeah—well, I’m putting you outa business, wise guy!

BILL: Says you!

BRAGG: Says me! How come you hang a “Private Property” sign on a dame you got no use for?

BILL: Who says I ain’t?

BRAGG: You got that Broadway blonde, Fay, ain’t you? Okay! I’m takin’ over Trina n’ the rest of the boys in camp’ll back me up on it!

BILL: You think so!

BRAGG: I know so!

BILL: Even when I tell ‘em we’re gettin’ married?

BRAGG: Married?

BILL: Sure—me an’ Trina have been keepin’ it as a surprise. Now, get out of her, Bragg, an’ get out fast!

BRAGG: Okay . . . Okay, Bill . . . (Fading a Little) I'll just spread the word around camp to be expectin' a wedding! So long,—beautiful—see you in church.

SOUND: Door Closes

BILL: The dirty bindlestiff! Why didn't I just bust him one instead of wastin' my breath! [130]

"The Star and the Story" -12

2/20/44

TRINA: Bill—Bill did you mean what you just said?

BILL: What I said about what?

TRINA: About . . . about gettin' married . . . ?

BILL: I said it, didn't I?

TRINA: (Breaking Down) Oh, Bill . . . Bill!

BILL: Sure—I don't blame you for cryin'! I could sit right down an' bawl myself! What'll I tell Fay? A beautiful dame like her—an' I have to get hitched up to you! Doggone—I oughta bend over an' give myself a good swift kick in the pants!

MUSIC: (Up to Finish)

(End of Act One) [131]

"The Star and the Story" -13

2/20/44

REED: Before we hear the second half of tonight's story—there's another story we'd like you to hear . . . a story of doubt in Germany. It concerns a shy, smiling young man who approached German customs in 1937. He had a package under his arm. "What is that?" said the customs official. "Rubber," the man replied. "Synthetic rubber." The official paled, his eyes tightened in

doubt . . . then he laughed and let the American through. And the American travelled throughout Germany, the precious little package tucked under his arm.

At every great chemical plant, he told them "this package contains synthetic rubber." He was immediately admitted; asked where the synthetic came from. "I made it," said the American simply. And every time—a moment of suspicious doubt as the Germans stared at him . . . then laughter! That rubber, the Germans were sure, could only be their own. And so this young man—a research man from Goodyear—travelled through Germany with his American-made synthetic rubber—hoping to learn more from the country that then professed friendship to us . . . and he learned only that Germany believed Americans couldn't possibly have made synthetic rubber. Yet he and his associates at Goodyear had made it. For then, as today, Goodyear led in research. . . . In their laboratories, they had made synthetic rubber as early as 1924. In 1927 Goodyear patented a process that [132] synthetic rubber manufacturing today. In

"The Star and the Story" -14  
2/20/44

1937, Goodyear made America's first all-synthetic rubber tire. And today America is turning out literally millions of tires of synthetic rubber for passenger cars, trucks, and farm and military vehicles. Yes, the public benefits because Goodyear leads in rubber research. And the public will continue to benefit, for today, in Goodyear's new million dollar research laboratory, the company is seeking ways to improve and further utilize synthetic rubber. You see, Goodyear synthetic rubber, like all Goodyear products, must be better today than it was yesterday, better tomorrow than it is today! [133]

"The Star and the Story" -15  
2/20/44

REED: And now the second act of "A Man's Castle," starring Walter Pidgeon and Loretta Young. Three months have passed since Bill brought Trina to the settlement of packing-box shacks. The one they are occupying is pathetically primitive—but it is spotlessly clean and shows Trina's brave attempts to make it more cheerful and homelike. At the moment, (Train Whistle) Bill is away and Trina is bent over a wash-tub washing his clothes. As she scrubs, she hums a melody that Bill often whistles . . .

TRINA: (Humming Use Double as Trina's Voice Will Come in Over Melody for Effect)

"Da-da-da-da-da-da-da-da-Baby—

That's the only thing I'm thinking of, Baby—

Da-da-da . . . Da-da-da . . .

Da-da-da-da . . . (Continues Behind Announcer)

ANNCR: But Trina is thinking—thinking about, Bill. Her thoughts run like this—

BUSINESS: (Vocalist Continues Back of Trina)

TRINA: (Slight Filter) (Loretta) . . . he hasn't said nothing' about goin' away for two or three weeks . . . and those train whistles . . . he don't seem to hardly hear 'em no more . . . maybe it'll always be just like this . . . maybe he likes me enough to stay . . . maybe Bragg's just tryin' to scare me when he says all them things . . .

BRAGG: (Filter) He ain't sick of you yet—but give him time! I know his kind—here today an' gone tomorrow!

TRINA: (Filter) Maybe it won't be that way! He likes me . . . I know he likes me from the way he looks at me when he thinks I ain't watchin' him . . . maybe . . . in his way—he even loves me. [134]

"The Star and the Story" -16  
2/20/44

BRAGG: (Filter) You don't know your men, sister, You're a cinch to get the air sooner or later. You just wait an' see!

TRINA: (Filter) He won't leave as long as he feels free! As long as he knows he can go anytime he wants—he won't wanna go! . . .

An' I won't never do nothin' to tie him down—

BUSINESS: (Fade Humming Out in Above Speech and Sneak Orchestra in . . . a Theme That Can Build and Become Ominous Behind Following Speeches)

BRAGG: (Filter) Askin' him to buy you a new stove is tyin' him down, ain't it?

TRINA: (Filter) But this one's wore out—an' that one in the window was such a beautiful, all-around sort of stove!

BRAGG: (Filter) Yaaaa! That scared him, that did! I bet he runs out on you!

TRINA: (Filter) No!

BRAGG: (Filter) I bet he hopped a rattler!

TRINA: (Filter) No!

BRAGG: (Filter) You'll never see him again!

TRINA: (Filter) Yes!

BRAGG: (Filter) He's gone for good, Sister!

TRINA: (Filter) No! No! No! (Music Reaches Peak)

SOUND: Door Opens . . . Closes. (Music Cuts)

TRINA: (Clear Mike) Bill!

BILL: Hello, whoosits.

TRINA: (Breaking Down) Bill . . . Oh, Bill!

BILL: Hey . . . Hey, what's the matter with you? [135]

"The Star and the Story" -17  
2/20/44

TRINA: Nothin' . . . nothin' . . . it's just that I'm so glad to see you, that's all.

BILL: Has Bragg been hangin' around botherin' you?

TRINA: No . . . no, I ain't even seen him. It's just that I got to thinkin' . . . you was so late, an' all . . .

BILL: I picked up a job servin' a summons—then I stopped an' played ball with some kids. Then I had some shoppin' to do.

TRINA: Shopping? You bought somethin', Bill?

BILL: Open the door an' look outside . . . Go on—take a look.

(Door Opens) Well—what d'ya think of it?

TRINA: Bill!

BILL: Pretty classy, huh?

TRINA: It's the stove!

BILL: Now maybe you can cook somethin' fit to eat now.

TRINA: You bought it! You knew how I wanted it!

BILL: I paid five bucks down. If I gave 'em two bucks a month for a year we'd own it. 'Course I won't be here that long. When I shove off in a few months you can send it back.

TRINA: Oh, Bill . . . I don't know what to say . . . It's so beautiful it just kinda hurts.

BILL: Come here.

TRINA: What?

BILL: Come here!

TRINA: Yes, Bill?

BILL: Look at you. You're a heck of a lookin' woman for a man like me. Skinny. No hips. No. nothin! [136]

"The Star and the Story" -18  
2/20/44

TRINA: Well . . . I'm young, kinda . . . Maybe I'll sorta fill out.

BILL: Nope. You'll never look like a woman.

TRINA: What difference does it make, as long as you're good to me?

BILL: I'm not good to you. Why—any moment—I'm liable to grab you like this an' knock your teeth out . . . see?

TRINA: (Softly) Bill . . .

BILL: (Gently) Little old Whoosits . . . (Pause) . . . You women get some phoney ideas! This is no time of day to be kissin'! Come on, now—get to work! Yes—and if that stew's burned tonight I'll pour it right down your back!

MUSIC: (Up . . . Transition . . . Fades)

SOUND: Knock on Door

VOICE: (Off Over Sound) You're on next, Miss La Rue!

FAY: (Calling) Right! (To Bill) Here—hook me up the back, Bill.

BILL: Okay, Fay. Well—so the show closes tonight, huh?

FAY: Uh-huh—and the London opening's three months away.

BILL: Look—hold still, will you?

FAY: We can take in Miami, Bermuda, Rio . . .  
How does that strike you, Bill?

BILL: Sounds great, Fay.

FAY: You don't sound very enthusiastic. Didn't you always tell me you liked to go places?

BILL: I said it was great, didn't I?

FAY: There's nothing to keep you here, is there?

BILL: Nope.

FAY: You said something about another girl? [137]

"The Star and the Story" -19  
2/20/44

BILL: She knows I'm liable to give her the air 'most any day. All I got to do is say goodbye.

FAY: There's a boat sailing at ten o'clock in the morning.

BILL: Okay. I'll meet you on the pier.

SOUND: Knock on Door

VOICE: (Off Over Sound) You're on, Miss La Rue!

FAY: (Calling) Coming! (To Bill) Don't disappoint me, honey!

BILL: I won't.

FAY: Don't forget—Pier 18, ten o'clock tomorrow morning. I'll be waiting for you!

MUSIC: (Up Transition Down)

Sound: Door Opens and Closes

TRINA: (In a Small Voice) Hello, Bill.

BILL: (Just Off) Hello.

TRINA: Your dinner got cold. I put it back on the stove to warm it up.

BILL: I had dinner.

TRINA: Oh . . . kinda . . . kinda hot t'day, wasn't it? . . .

BILL: Why don't you say what's on your mind? Why didn't you squawk 'cause I came home late for supper?

TRINA: You got a right to come home late, Bill.

BILL: I suppose you want me to make up excuses?

TRINA: You don't ever hafta make up excuses to me for anything. You know you don't . . . You're tired . . . Lie down an' rest . . .

BILL: I always told you I wasn't reliable, didn't I?

TRINA: Sure you did. [138]

"The Star and the Story" -20  
2/20/44

BILL: Haven't I said I might wake up some mornin' with a taste in my mouth like wet hen feathers—an' when that happened, I'd take a stroll for myself—no matter how much I like you?

TRINA: Sure—but maybe it won't be tomorrow—or quite so soon.

BILL: Can't tell. I'm gettin' restless, see? . . . I got to go places . . . Come here, Whoosits . . .

TRINA: Yes, Bill?

BILL: There's somethin' I got to tell you . . . Only somehow I can't get the right words . . . Funny . . . That's never happened to me before.

TRINA: You're tired . . . like I said. Lie back an' tell me tomorrow. There—isn't that better? Didja play ball with those kinds today?

BILL: No.

TRINA: I guess they kinda missed you.

BILL: Maybe . . .

TRINA: Bill . . .

BILL: Uh-huh . . .

TRINA: Bill, listen . . . you like kids, don't you?

BILL: Why?

TRINA: Well, because . . . because you're gonna have one. (Quickly) I've know it for a long time—several months. I thought I'd be afraid to tell you—but ever since we been here I ain't afraid of nothin' . . .

BILL: Now, look— [139]

"The Star and the Story" -21  
2/20/44

TRINA: Don't say nothin' till I finish, Bill . . . I want you to know something. It's your baby an' mine—but you got nothin' to worry about. I'm willin' to take all the blame for it. Why, I didn't mean to tell you at all. But pretty soon you'd know anyway, an' it's just too—too grand to keep to myself. You can't understand it, Bill—you're a man—but it's wonderful!

BILL: Wonderful?

TRINA: You needn't look at me like that, darling. I'm not afraid of you or anything anymore. Only a little while ago I was left all alone. Then you came along and there was two of us. Now there is three of us. You can never leave me now, Bill. Even if you go away—I won't be left alone! (Hysterically) No matter where you go—no matter what you do—I've got you—I've got you! You're a prisoner inside of me!

BILL: Yeah? That's what you say!

TRINA: Bill! Bill! Where you goin'!?

Bill: Out! (Door Open—Slam)

MUSIC: (Up . . . Transition . . . Fades, the Network Forbids Actual Police Sirens . . . but if the Effect Could Be Gotten Musically in Scoring This Transition . . . I Think It Would Pass . . . Anyway, Try for Something Dramatic . . . Then Cut Clean)

Sound: Door Opens . . . Closes Quickly

TRINA: Bill! Oh, Bill—you came back!

BILL: Sure I come back.

TRINA: You're hurt . . .

BILL: Forget about that— [140]

“The Star and the Story” -22  
2/20/44

TRINA: You got blood on your sleeve!

BILL: It's nothin'—a bullet just nicked me, that's all—

TRINA: A bullet?

BILL: Look—there's no time for a lot of talk!

TRINA: Bill!

BILL: I only stopped to tell you not to say nothin' if the cops come around.

TRINA: The cops.

BILL: I don't want you mixed up in this. You don't know me—you never heard of me, see?

TRINA: What'd you do, Bill?

BILL: I tried to crack the safe at the toy factory—

TRINA: Bill!

BILL: Only I muffed it.

TRINA: Let me fix your arm. Oh, Bill—why didja do it? Why?

CLERK'S NOTICE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

LAWRENCE HAZARD,

Appellant,

vs.

No. 10975

COLUMBIA BROADCASTING  
SYSTEM, INC., et al.,  
(Assigned for hearing on  
August 1, 1945)

Appellees.

Submitted to Circuit Judges DENMAN, STRUMINS and BONE.

卷之三

卷之三

Yamada, T., & Kondo, T. (1990). The effect of the Japanese language on the Japanese brain. In M. G. Gazzola (Ed.), *Language and the brain* (pp. 111-128). London: Lawrence Erlbaum.

you know? It's a question I have trouble with you. The answer

OFFICES ON ELLIS.

San Francisco, California.  
July 10, 1945.

BILL: I couldn't check out leavin' you high an' dry, could I?

TRINA: Even if you had got the money—I wouldn't-a took it!

BILL: It takes dough to have a kid, don't it?

TRINA: For a big, strong, husky man, you're awful afraid of a little bit of a thing that ain't even born yet. Goodness! If I'd a-known it'd scare you so much, I never woulda told you. You're such a coward, darlin'

...  
BILL: Coward? [141]

"The Star and the Story" -23  
2/20/44

TRINA: Afraid of havin' a baby! Huh! It's the most natural thing in the world. They're born all the time. An' if they happen to be men-kids, they never grow up—just keep reachin' for the clouds all the time, an' listenin' to train whistles. Why—you're such a silly—tryin' to rob safes to get money when you always said you had no use for money.

BILL: It wasn't for me.

TRINA: For me—I know. But I don't need any. I don't need anything—not even you. An' don't you suppose I realize how I've held you back an' messed up your plans . . . only I didn't mean to. You can go, Bill—an' stay as long as you like. Maybe some day you'll come back. Oh, not for good, I don't mean—just to visit. You might get lonely sometime, an' sorta curious an' wanna know what your son looks like—may be. Gosh—even birds can't fly all the time, can they? They get tired an' have to come home sometimes. They got nests, ain't they?

BILL: Oh, Trina.

TRINA: (Breaking) Oh, darling . . . darling . . . please please I want you to be happy. I'll do anything if you'll only be happy! I'll give up anything . . . even the baby—if you'll only be happy.

BILL: Trina . . . Trina, darling.

TRINA: Oh Bill!

SOUND: Door Opens

FLOSSIE: (Just Off) Hey, Bindlestiff, your freight train's waitin' an' you better hop aboard! [142]

"The Star and the Story" -24  
2/20/44

BILL: Beat it, Flossie.

FLOSSIE: You goin' to sit there like a sap an' let the cops nab you?

BILL: I'm stickin' around.

FLOSSIE: Changed your mind sudden, didn't you?

BILL: Maybe—but I'm not leavin' Whoosits.

FLOSSIE: A lotta good you'll be to her locked up in the Big House!

BILL: Just the same—I'm stayin'.

FLOSSIE: Why, you dumb lug—why don't you ever use your head? Didn't you ever think of takin' her with you?

BILL: No—No I didn't . . . why that's the screwiest idea I ever heard of.

MUSIC (Up . . . Quick Transition . . . Fades)

SOUND: Train Effect . . . Distant Whistle . . . Click of wheels.

TRINA: It was a lovely house . . . I'll certainly miss it . . . and, oh, Bill—it was such a beautiful stove!

BILL: Forget it, Whoosits. We can always get another one on the installment plan—a better one, too . . . Warm enough? [143]

**"The Star and the Story" -25**

TRINA: Uh-huh . . . I never knew freight cars rode so easy-like.

BILL: Let's see . . . August-September-October-November . . . December . . . December . . . Whoosits . . .

TRINA: December . . . I guess he'll be sort of a Christmas present, Bill.

BILL: Yeah . . . Yeah, that oughta be all right . . . You know something? I guess all my life I've wanted a baby for Christmas.

TRINA: Have you really? . . . Gee! . . . Wonderful as things are—you just got to believe there's a Santa Claus!

Sound: Train Whistle

Music: (Up to Finish) [144]

**"The Star and the Story" -26  
2/20/44**

PIDGEON: Thank you, Loretta Young, for a very beautiful and moving performance. Now don't go away until you've heard about The Star and the Story for next week . . . and also something of interest to every one who has a car. Tobe . . . if you please.

REED: The next new tire you put on your car will probably be made of synthetic rubber, a new material to most American tire makers. So when you come to select that tire, remember this . . . Goodyear has had twenty years experience in making and working with synthetic rubber. Goodyear made America's first all-synthetic rubber tire. And for twenty-eight consecutive years, it has been a fact that more people ride on Good-year tires than on any other kind. Remember when you buy your first synthetic rubber tire, that leadership in rubber research, leadership in the study of synthetic

rubber, leadership in tire-making have made Goodyear . . . the greatest name in rubber!

PIDGEON: And—continuing with the greatest names in entertainment, next week our star will be Rosalind Russell and the story "His Girl Friday"! How does that appeal to you, Loretta?

YOUNG: Sounds just about perfect to me—I'll be listening. [145]

"The Star and the Story" -27  
2/20/44

PIDGEON: We'd like very much to have you back later this season, Loretta, so give some thought to what story you'd like to do, will you?

YOUNG: I'll be happy to—Goodnight.

(Applause)

PIDGEON: Goodnight, Loretta Young.

REED: Walter Pidgeon academy award nominee, can currently be seen in Metro-Goldwyn-Mayer's picture of the year, "Madame Curie." Loretta Young can soon be seen in "Ladies Courageous."

PIDGEON: Well ladies and gentlemen, I hope you'll be with us next week—until then, to you all—Goodnight from Goodyear.

REED: The music on this program was arranged and conducted by the General Musical Director of Twentieth Century Fox, Alfred Newman. "A Man's Castle" was adapted from the Columbia Picture of the same name. Be sure to listen to The Star and the Story next week when Walter Pidgeon, as your Goodyear host, brings you Rosalind Russell in the gay comedy, "His Girl Friday." This is Tobe Reed saying goodnight on behalf of Goodyear, the greatest name in Rubber.

This is CBS . . . the Columbia . . . Broadcasting system. [146]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS COLUMBIA BROADCASTING SYSTEM, INC., A CORPORATION, WALTER PIDGEON, AND YOUNG & RUBICAM, INC., A CORPORATION.

For answer to the complaint on file in the above entitled action the defendants Columbia Broadcasting System, Inc., a corporation, Walter Pidgeon and Young & Rubicam, Inc., a corporation, deny, admit and allege as follows:

I.

Answering paragraph V of said complaint the said defendants allege that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V.

II.

Answering paragraph VI of said complaint the said defendants allege that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the [147] allegations contained in paragraph VI.

III.

Answering paragraph VII of said complaint the said defendants allege that they and each of them are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VII.

## IV.

Admit that Columbia Pictures Corporation of California, Ltd., under the terms of an agreement between said corporation and the plaintiff dated March 25, 1933, acquired certain rights in and to said dramatic composition "A Man's Castle," and allege that attached hereto, marked Exhibit "A" and made a part of this answer, is a full, true and correct copy of the license agreement executed March 25, 1933, between the plaintiff and said Columbia Pictures Corporation of California, Ltd. Allege that said defendants and each of them is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said paragraph VIII of the complaint.

## V.

Deny each and every allegation contained in paragraph IX. Allege that Columbia Pictures Corporation of California, Ltd., pursuant to the license agreement hereunto annexed as Exhibit "A," and prior to the year 1944, made, prepared and produced a motion picture version of the dramatic composition entitled "A Man's Castle," and that said motion picture version was exhibited throughout the United States of America and abroad. Prior to February 10, 1944, Columbia Pictures Corporation of California, Ltd., a California corporation, was merged with Columbia Pictures Corporation, a New York corporation, under the name Columbia Pictures Corporation. On February 10, 1944, Columbia Pictures Corporation licensed the defendant Walter Pidgeon to produce one radio broadcast based upon said motion picture version.

Thereafter [148] defendant Walter Pidgeon prepared and produced for radio broadcast a sketch of the motion picture version of said dramatic composition, and said sketch of said motion picture version was broadcast on the 20th day of February, 1944, from the Hollywood Studios of defendant Columbia Broadcasting System, Inc., and at no other time and on no other occasion.

## VI.

Deny that the instrument attached to the complaint as Exhibit 2 is a radio adaptation of plaintiff's copyrighted dramatic composition, and allege that said instrument is the radio sketch of the motion picture version of said dramatic composition, which motion picture version was prepared and produced by Columbia Pictures Corporation of California, Ltd. pursuant to the license agreement hereunto annexed as Exhibit "A."

Wherefore, defendants pray that said action be dismissed, that defendants recover their costs in the action and reasonable attorneys' fees to be allowed to the defendants by the court, and for such other and further relief as is just.

MITCHELL, SILBERBERG & KNUPP

By Guy Knupp

Attorneys for said Defendants. [149]

## EXHIBIT "A"

Agreement made this 25th day of March, 1933, between Lawrence Hazard hereinafter called the "Owner(s)" and Columbia Pictures Corporation of California, Ltd., a California Corporation, hereinafter called the "Purchaser" as follows:

1. The Owner(s) hereby grant(s) sell(s) assign(s) and set(s) over to the Purchaser, forever, the entire motion picture rights, including the silent and/or sound and/or talking and/or musical, (in all languages), motion picture rights (all such rights being hereinafter included and embraced in the expression "motion picture rights"), for the entire world, in and to a certain dramatic work entitled "A Man's Castle" written by Lawrence Hazard (hereinafter called the "Author(s)" the title and them thereof, exclusively, together with all of the benefits of the copyrights of such work and of all remedies for enforcing such copyrights with respect to such motion picture rights.

The Owner(s) hereby grant(s) to the Purchaser the exclusive right to make motion picture versions and silent and/or sound and/or talking and/or musical motion picture versions of such work (all such versions being herein-after included and embraced in the expression "motion picture versions"), to translate, adapt, arrange, change, transpose, add to and subtract from such work and the title thereof to such extent as the Purchaser may deem expedient, to use excerpts from such work for the title, sub-titles, text and dialogue of such motion picture versions, to publish, for the purpose of advertising and exploiting such motion picture versions, in such form as the Purchaser may deem advisable, including its publications in newspapers, fan magazines and trade periodicals, a

synopsis or story of such motion picture versions, not exceeding, however, ten thousand words in length, to use excerpts from such work in heralds, programs, booklets, posters, lobby displays, press books and all other mediums of advertising and publicity whatso- [150] ever, to broadcast sketches of such motion picture versions, to use parts of such work or of the theme thereof in conjunction with other work or works in the making of motion picture versions, and the exclusive unlimited and unrestricted right to produce, reproduce, distribute, exhibit and otherwise exploit and dispose of such motion picture versions, and to secure copyright and copyright registration therein in all countries of the world in Purchaser's name or otherwise.

The Owner(s) hereby appoint(s) the Purchaser his true and lawful attorney irrevocable, in the Owner(s) name or otherwise, but for the Purchaser's sole benefit and at the Purchaser's expense, to enforce and protect such motion picture rights under any and all copyrights and renewals of copyrights and to prevent the infringement thereof and to litigate, collect and receipt for all damages arising from any infringement of such rights and to join the Owner(s) in the Purchaser's sole judgment, as a party plaintiff or defendant in any such suit for infringement.

2. The Owner(s) warrant(s) that the Owner(s) (is) (are) the sole owner(s) of the motion picture rights in such work and (has) (have) full right and authority to grant the rights hereby conveyed. The Owner(s) further warrant(s) that such work is original with the Author(s) in all respects and that no incident therein contained, and that no part thereof was taken from or based upon any other literary or dramatic or musical work or any motion picture or in any way infringes upon the

copyright or common law right or the literary, dramatic or motion picture rights of any party whosoever; that such work has been duly copyrighted in the United States in the name of the Author(s) under the title "A Man's Castle," on May 28, 1932 under Entry: Class D2, No. 16584; that the motion picture rights of such work have in no way been sold, mortgaged or otherwise disposed of and are free and clear of any [151] liens or claims whatsoever in favor of any party whomsoever; that the title of such work, mentioned in Article 1 hereof, may be used as the title of any such motion picture version; that the reproduction and exhibition of such work in the form of motion picture versions will not in any way infringe upon any rights of any party whomsoever; that the Owner(s) (has) (have) done no act or thing that can in any way prevent or interfere with the full enjoyment by the Purchaser of the rights hereby acquired.

The Owner(s) agree(s) and guarantee(s) to defend, indemnify and hold the Purchaser harmless against any losses, damages, expenses or judgments which may be sustained or suffered by or secured against the Purchaser by reason of the use of the title of such work for the title of any such motion picture versions, or of any infringement of any copyright or common law rights or any literary, dramatic, musical or motion picture rights, on account of any use which the Purchaser may make of such work in the making of the motion picture versions thereof, the distribution, exhibition or other disposition of such motion picture versions, or the exercise or attempted exercise of any of the rights hereby granted.

The warranties contained in this article apply only to the material used in such motion picture versions taken from such work written by the Author(s) and do not

. . . . .

in any way apply to any extraneous matter inserted by the Purchaser in such motion picture versions.

3. The motion picture rights herein granted and assigned to the Purchaser by the Owner(s) include the exclusive right to make and use disc records, sound on film, and any and all other mechanical contrivances or devices for the recordation of the sound and talking and musical and other audible portions of any such motion picture versions and for the reproduction and performance of all such sounds as part of or incidental to the exhibition thereof, [152] and also include the exclusive right to project by television, radio, electricity or in any other manner any such motion picture versions, including the sound, talking, singing and other audible portions thereof, through space, for exhibition and performance at any and all places away from that wherein any such motion picture versions shall be exhibited and performed.

4. Deleted.

5. In case there shall be any renewals or extensions of the United States Copyright in such work or in any part thereof, then the Purchaser shall be deemed to have acquired under any and all such renewed or extended copyrights, all the rights in such work which have herein been granted, sold, assigned and set over to the Purchaser, and if requested by the Purchaser, the Owner(s) agree(s) to duly execute or cause to be duly executed, acknowledged and delivered, any instruments that may be necessary, proper or expedient to establish the vesting in the Purchaser of such rights during such renewed or extended period.

6. The Purchaser agrees to use the name of the Author(s) in its paid publicity and to state upon the film itself, for exposure long enough to be read, that such

motion picture versions or parts thereof are based upon the work written by the Author(s), or words to that effect.

7. All rights not herein specifically granted to the Purchaser shall be reserved to the Owner(s).

8. The Owner(s) agree(s) to duly acknowledge, execute and deliver, or procure the due execution, acknowledgment and delivery to the Purchaser of any and all further assignments and other instruments that may be necessary or expedient to carry out and effectuate the purposes and intent of this agreement and to convey to the Purchaser all rights herein granted to it, during the original term of the United States Copyright in such work and during all renewals and extensions thereof. [153]

9. In full consideration for all grants herein made and all rights herein assigned, the Purchaser agrees to pay to the Owner(s) upon the execution and delivery hereof, the sum of Twenty-Five Hundred (\$2500.) Dollars by paying the same to and to the order of Century Play Company, 1440 Broadway, New York City, as Agent for the Owner. Receipt of the foregoing is hereby acknowledged by the Owner(s).

10. Wherever in this agreement reference is made to the Owner(s), it shall be deemed to embrace and include the Owner(s) heirs, executors, administrators, next of kin, successors and assigns, and wherever reference has been made to the Purchaser, such reference shall be deemed to include and embrace its successors and assigns and the Purchaser shall have the free, full, unrestricted and unlimited right to sell, assign, transfer or otherwise dispose of this agreement, and/or any or all of its right, title and interest thereunder, in whole or in part.

11. This agreement shall enure to the benefit of and be binding upon the respective heirs, executors, administrators, next of kin, successors and assigns of the parties hereto.

In Witness Whereof, the parties hereto have caused these presents to be duly executed the day and year first above written.

(Signed) Lawrence Hazard

COLUMBIA PICTURES CORPORATION,  
of California, Ltd.

By (Signed) Jack Cohn

(Corporate Seal) [154]

State of New York )  
 ) ss:  
County of New York )

On this 25th day of March, 1933, before me personally came Lawrence Hazard to me personally known and known to me to be the individual described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same for the uses and purposes therein mentioned.

(Notarial Seal) Lynn Davidson

Notary Public Westchester Co.  
Cert. filed in N. Y. Co. #758

Commission expires March 30, 1934.

State of New York    )  
                        ) ss:  
County of New York )

On this 27th day of March, 1933, before me personally came Jack Cohn to me known, who being by me duly sworn did depose and say that he resides in N. Y. City; that he is the Vice President of Columbia Pictures Corporation of California, Ltd., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Notarial Seal)

Bernard Birnbaum

Notary Public Kings Co., No. 479B,  
Reg. No. 4600, Cert. filed in N. Y. Co.  
No. 1518, Reg. No. 4-B-951.

Commission expires March 30, 1934. [155]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT GOODYEAR TIRE & RUBBER CO., INC., A CORPORATION.

The defendant Goodyear Tire & Rubber Co., Inc., a corporation, for answer to the complaint on file herein, denies, admits and alleges as follows:

I.

Alleges that said defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph V.

II.

Alleges that said defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph VI.

III.

Alleges that said defendant is without knowledge or [156] information sufficient to form a belief as to the allegations contained in paragraph VII.

IV.

Alleges that said defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph VIII.

V.

Denies each and every allegation contained in paragraph IX.

VI.

Alleges that said defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph X.

Wherefore, defendant prays that plaintiff take nothing by his complaint, that said action be dismissed, that defendant have and recover of and from the plaintiff its costs in the action and reasonable attorneys' fees to be allowed to defendant by the court, and for such other and further relief as is just.

MITCHELL, SILBERBERG & KNUPP

By Guy Knupp

Attorneys for Defendant Goodyear Tire & Rubber Co.,  
Inc., a corporation. [157]

---

[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated as Follows:

1. The allegations of paragraphs I, II, III, IV, V, VI and VII of the complaint are true. A true and correct copy of the dramatic composition written by plaintiff and referred to in paragraph V of the complaint is attached to the complaint and marked "Exhibit 1."

2. The license agreement referred to in paragraph VIII of the complaint, dated March 25, 1933, between plaintiff and Columbia Pictures Corporation of California, Ltd. is attached to the answer herein and marked "Exhibit A." The said license agreement was prepared by

Columbia Pictures Corporation of California, Ltd. upon its own printed form.

3. Thereafter Columbia Pictures Corporation of California, Ltd. produced a motion picture photoplay entitled "A Man's [158] Castle," the screenplay and dialogue continuity for which motion picture is hereunto annexed and marked "Exhibit A."

4. Prior to February 12, 1944, Columbia Pictures Corporation of California, Ltd., a California corporation, was merged with Columbia Pictures Corporation, a New York corporation, under the name of Columbia Pictures Corporation.

On February 10, 1944, Columbia Pictures Corporation entered into an agreement, in writing, with defendant Walter Pidgeon, a true and correct copy of which agreement is annexed hereto and marked "Exhibit B."

Walter Pidgeon had theretofore entered into a contract with defendant Young & Rubicam, Inc., under the terms of which Pidgeon was employed to secure the necessary assistants—other than the guest star—and music, and to arrange for, produce and act in a radio play to be broadcast over the facilities and from the studio of defendant Columbia Broadcasting System, Inc., Young & Rubicam, Inc., acted for and on behalf of a corporation which sponsored the program and said corporation is not a defendant in this action. The program was broadcast on February 20, 1944, from the Hollywood studios of Columbia Broadcasting, over a national hookup comprising 131 stations. The duration of the program was one half

hour, and a full, true and correct transcription thereof is attached to the complaint and marked "Exhibit 2." The radio play was not broadcast at any other time or over any other station.

5. Defendant, Goodyear Tire and Rubber Co., Inc., expressly denies that it in any way participated in, was responsible for, procured or caused to be done any of the acts or things referred to in paragraph IX of the complaint.

6. In addition to this stipulation and the exhibits thereto, the court may, if it so desires, listen to a transcription of the radio broadcast and view the motion picture based upon the screenplay hereto attached as "Exhibit A." [159]

7. In addition to this stipulation, either plaintiff or defendants may, upon the trial of said action, offer such evidence not contrary to this stipulation as he or they may consider material.

Dated: August 31st, 1944.

LOEWENTHAL & ELIAS

By Paul Loewenthal

Attorneys for Plaintiff

MITCHELL, SILBERBERG & KNUPP

By Guy Knupp

Attorneys for Defendants. [160]

[Title of District Court and Cause.]

EXHIBIT A TO STIPULATION

[161]

MAN'S CASTLE  
COLUMBIA NO. 2  
33 - 34

13

[162]

COLUMBIA NO. 2

13

Please return this script to Production Manager  
When Picture is Completed

Wright-O

---

(  
(  
( Received from Production Manager's Office  
(  
(  
(  
( 1 SCRIPT 13  
(  
(  
(  
( Title COLUMBIA NO. 2  
(  
( Signed.....  
(  
( [163]

## COLUMBIA #2

FADE IN:

1. EXT. SECTION OF A CITY PARK—DUSK—CLOSE SHOT

Of some pigeons scurrying about, picking at popcorn or bread crumbs being thrown to them.

CAMERA TRUCKS BACK to show Bill seated on one end of a park bench—the very personification of Van Bibber—a sartorial sensation in evening clothes with tails, Inverness cape, opera hat and cane. Bill is a burly young man in his late twenties, built like a football player and wearing his stylish clothes magnificently. Yet there is something about him which tips off the fact that he would look even better in a sailor's rig or corduroys. He is enjoying himself feeding the pigeons, leaning over as he throws the popcorn in their midst. He smokes a cigarette.

It is a midsummer evening. From the Casino, nearby but out of the shot, comes the honeyed moaning of a stringed orchestra. This will play through the progress of the scene.

As he feeds the pigeons, Bill looks out of the corners of his eyes toward his right. We get the feeling that he is surreptitiously watching something. Finally he sits upright from his bending position and openly turns his gaze right with an expression of slightly suspicious appraisal. As he does so, CAMERA PANS RIGHT for CLOSE SHOT OF TRINA, seated on the other end of the bench. She is neatly but shabbily dressed, her suit shiny with wear but bravely tidy. She is act-

ing strangely. As she watches the pigeons her face works and there is a desperate, almost hysterical look in her eyes. There is a pinched look about her mouth. She is pitifully thin and haggard. She is about twenty-one.

Aware of the scrutiny of the man on the other end of the bench, she takes her eyes off the pigeons and sits stiffly. Over this shot comes the voice of Bill.

BILL'S VOICE

What's the matter?

As she turns toward him CAMERA DRAWS BACK for a TWO SHOT. The cooing of the pigeons blends with the dulcet sounds from the Casino nearby as Bill moves nearer to Trina on the bench.

Continued [164]

1. CONTINUED

BILL

(his voice and manner of speaking in striking contrast to his fashionable get-up)

Come on—Spill it.

(he edges closer)

I been watchin' you ever since you sat down here an' you look like you were rehearsin' sumpthin'. What is it?

Terrified, the girl rises and is about to start away when he gets up and bars her progress—CAMERA DRAWING BACK TO WIDER ANGLE.

TRINA

(in a low voice)

Please—

BILL

What's the rush?

TRINA

Lemme go, or I'll—I'll—

BILL

You'll what?

She looks at him a moment in silence, then blurts out almost hysterically.

TRINA

I'll get down on my hands and knees for some o' that popcorn.

## 2. CLOSE TWO SHOT

BILL

What is it? I thought I knew all th' panhandlin' routines. Or are you the little girl reporter workin' on a sob story? If you are, I can tip you off to some swell stuff about these pigeons. Take that one there—

(he indicates)

## INSERT: CLOSE SHOT

Featuring one of the pigeons picking at crumbs.

BILL'S VOICE

I call him Oliver Twist. He's always askin' for more.

## 2. CONTINUED

BACK TO SCENE: As Bill continues:

BILL

And that one there—

Trina starts away. He grabs her arm.

BILL

Wait a minute. Are you really hungry?

TRINA

I ain't eaten in two days!

BILL

Two days? Why not?

TRINA

I haven't any money.

BILL

Neither have the pigeons, but they eat—and regular.

## 3. MED CLOSE SHOT

(Favoring Trina)

TRINA

(bitterly)

It must be great to be a pigeon. There's always somebody throwin' 'em crumbs.

BILL

If you have the brains of a pigeon you wouldn't be hungry.

Tears well up in Trina's eyes and her lips twitch. She is on the verge of open tearful hysteria. He flips his cigarette away into the bushes, then takes her by the arm.

BILL

Come on. Let's eat.

PAN as they start away.

DISSOLVE TO:

4. INT. CASINO—MED. CLOSE SHOT

Bill and Trina are seated at a table in a well fitted dining place. Music from the same orchestra comes into

Continued—[166]

4. CONTINUED

the scene. Bill's opera hat and cane are on a chair between them at the table. They have reached the coffee and dessert stage and the girl is avidly doing away with an elaborate confection. Bill's coffee and dessert are untasted before him. He is smoking a cigar, with an amused glint in his eyes, he watches her put away the food.

BILL

(after a silence during which the girl eats steadily)

For a pint size like you, you can certainly put it away. You're hungry all right. But if you think I fell for your line of hooey, you're crazy.

5. CLOSE SHOT

Trina eating. Bill's voice continues over shot:

BILL'S VOICE

No female ever has to starve in a town like this.

TRINA

(eating)

Why not?

BILL'S VOICE

Because she's female.

TRINA

(pauses; then speaks slowly)

Were you ever outa work for a whole  
year?

## 6. CLOSE SHOT

Bill.

BILL.

I been outa work all my life. And any-  
way, the unemployment problem's got noth-  
ing to do with women—

## 7. TWO SHOT

Favoring Trina, as she looks up, getting his  
meaning. He continues:

Continued—[167]

## 7. CONTINUED

BILL

Did you ever think of that?

TRINA

Yes. I thought of it.

BILL

Well?

TRINA

(simply)

I couldn't.

## 8. REVERSE ANGLE

Favoring Bill.

BILL

(sneers)

I suppose the river's better'n that.

TRINA

I thought o' that, too. I was down there  
this afternoon. But I was afraid.

BILL

How you ever goin' to get anywhere if  
you're afraid of everything?

## 9. MED. CLOSE SHOT

Of the two.

TRINA

I guess I just won't ever get anywhere.

(she notices his untasted food)

You're not eatin'.

BILL

I ain't hungry.

TRINA

Have you ever been hungry?

BILL

*Nobody* ever has to be hungry, *anywhere*.

[168]

## 10. CLOSE TWO SHOT

Favoring Trina. She looks at him wisely, noting  
his fashionable attire, glancing at his opera hat  
on the chair nearby.

## TRINA

Oh, it's all right for you to say that—  
you're rich.

Bill looks up suddenly and snaps his fingers. A waiter comes into scene and up to the table.

## 11. THREE SHOT

Featuring Bill and waiter.

## BILL

Call the manager.

## WAITER

Anything wrong, sir?

## BILL

No, everything's swell. I just want to  
see him a minute.

## WAITER

Yes, sir.

He exits. Bill turns to Trina again.

## BILL

You shouldn't ever ought to skip meals.

## TRINA

That was the best food ever I ate.

(with a sigh of content)

I feel better now.

## BILL

You look better.

(he inventories her slight form with his  
eyes)

If you filled out a little you'd get by in  
a crowd, at that.

(judiciously)

Women oughta stick out here an' there.

TRINA

You can't help the way you're made.

BILL

Why can't you?

[169]

### 12. MED. SHOT

Shooting past table toward manager as he arrives, bowing and smiling.

MANAGER

Did you wish to see me?

BILL

Yeah . . .

(he takes his opera hat and cane from the chair and places it on the table—gesturing toward the chair)

Sit down.

The manager sits down and waits expectantly.

### 13. CLOSE SHOT

Featuring Bill and manager. Bill takes his time, puffing on his cigar, blowing smoke rings.

BILL

There're supposed to be twelve million people in this country without work. Didya know that?

MANAGER

(startled)

Yes, I—

BILL

And a lot of 'em are starving. So they tell me. Now take this young lady, for instance—

(he gestures with his cigar toward Trina)

Up to an hour ago she hadn't eaten for two days. She was starving. So I brought her in here and fixed her up. She feels swell now. Says it's the best food she ever et.

MANAGER

(bewildered)

I'm glad to hear that. Thank you.

BILL

The only trouble is she ain't got a cent.

(he pauses and blows a smoke ring)

An' neither have I.

[170]

#### 14. CLOSEUP

Manager. His eyelids flutter once or twice in a blink eloquent of his astonishment.

#### 15. CLOSE SHOT

Bill, shooting past manager.

BILL

So the feed's on you, brother.

(in a chatty tone)

Now, there's a lotta ways of handlin' a case like this—

## 16. CLOSEUP

Trina, over which Bill's voice continues:

BILL'S VOICE

—you can call a cop an' have the pair of us thrown into the can—

## 17. THREE SHOT

Favoring Bill and manager.

BILL

We're sent to the Island where we're fed by the State for thirty days, at least. The more vags the State has to feed, the more taxes you people have to pay.

MANAGER

(outraged)

If this is your idea of a joke—

BILL

(aggressively)

Now, wait a minute. This is one of the joints that throws out enough left-over grub in a week to feed a thousand people. So you can afford one on the house once in a while.

(raising his voice)

Am I right or wrong? Tell you what I'll do! I'll put it up to your customers here—

## 18. MED. SHOT

By this time his raised voice has attracted the attention at nearby tables and people look in his direction as he continues:

BILL

I'll ask 'em whether it's right for you to let somebody die of hunger right outside of your dump. If they say I'm wrong, I'll admit it.

He rises, picks up a spoon and raps his tumbler sharply several times to attract attention.

## 19. MED. LONG SHOT

Shooting over heads of patrons toward Bill, as they look in his direction and startled waiters pause in their duties.

BILL

(in the manner of one about to begin a lengthy and eloquent oration)

Ladies and gentlemen—

## 20. MED. CLOSE SHOT

Featuring Bill as he continues:

BILL

Accordin' to the newspapers, the banks o' the nation are full o' gold, the granaries are burstin' with grain, an' yet there's twelve million people—

The manager, almost apoplectic, interrupts as he stands in front of Bill.

MANAGER

Go on—get out of here! Get out!

## 21. WIDER ANGLE

BILL

O.K.

(gravely, to the startled patrons)

The case is dismissed.

Continued—[172]

## L. CONTINUED

He picks up his hat and cane and addresses the astounded Trina.

BILL

Come on—

(he snaps his fingers as though trying to think of her name, then gives her one of his own)

—Whoosits.

He takes the Inverness cape, which has been draped over the chair occupied by the manager, and holds it up for Trina. He places it about her shoulders with an eloquent gesture. She draws it close about her.

BILL

There's nothing like a good walk after dinner.

He takes her arm and, jauntily swinging his cane, they exit, followed by the amazed gaze of the patrons as

DISSOLVE TO:

22. EXT. BROADWAY—NIGHT—MOVING SHOT

Bill and Trina as they walk down the street. They make an ill-assorted pair—he magnificent in his evening clothes; she a little drab in her everyday clothes and looking tiny beside his bulk. She is very proud to be walking alongside this man and a little afraid. She has perked up considerably, what with the food and the excitement in the restaurant. From somewhere ahead of them a store front radio emits orchestral music with a crooning vocal accompaniment which persists thruout the entire scene.

BILL

Where d'you live?

(she shrugs)

I might as well take you home.

TRINA

That'd be all right if I had a home.

This brings Bill to a stop.

23. MED. CLOSE SHOT

Of the two. Throughout this shot there will be a constant flux of passersby, some of whom will throw an occasional

Continued—[173]

23. CONTINUED

curious glance at the ill-assorted pair.

BILL

(explosively)

What's the matter with you? Haven't  
you got anything?

She shakes her head sadly.

BILL

Where d'you figure on spendin' the night?

TRINA

I don't know.

BILL

Have you got a grip?

She shakes her head.

BILL

Well, get one somewhere. Then go to a hotel and register. Stay there till they hand you a bill—then tell 'em you're broke.

## 24. TWO SHOT

Favoring Trina.

TRINA

Then what happens?

BILL

Then they throw you an' you go to another hotel.

TRINA

I couldn't do that.

BILL

Why not?

TRINA

I'd be afraid.

(she pauses and adds)

Do you live in hotels—that way?

25. REVERSE ANGLE

Favoring Bill.

BILL

Nah. I got no use for hotels.

TRINA

(timidly)

What do you do for a livin'?

BILL

I live.

(he put his hands in his pockets suddenly  
and says)

Close your eyes a minute.

Surprised, she obeys.

26. CLOSEUP

Trina, obediently standing with her eyes closed.  
Over this the voice of Bill:

BILL'S VOICE

Now open.

She opens her eyes and takes it big as she sees:

27. CLOSE SHOT

Bill. His shirt front is now illuminated with lettering which reads: GILSEY HOUSE COFFEE. The advertising legend flashes on and off his shirt front as he works the electric card from a button switch in his pocket. Bill rather keenly enjoys the bewilderment of Trina.

[175]

28. MED. CLOSE SHOT

of the two. People passing by now definitely pause to look at the ballyhoo, nudging each other and smiling.

BILL

Two bucks a day for this—an' all you gotta do is to walk up an' down an' flash the light on an' off.

TRINA

(awed beyond measure)

Is this your regular job?

BILL

Nah. I don't believe in regular jobs. I'm only doin' this for a friend of mine. I sub for him on his night off.

TRINA

(wondering)

And all you gotta do is walk up an' down?

BILL

That's all.

TRINA

Is it all right if I walk up an' down with you?

BILL

It's a free country, ain't it?

CAMERA TRUCKS BEFORE THEM as he resumes his walk with Trina alongside. As they promenade down Broadway with eddies of humanity passing on both sides, the legend of Gilsey House Coffee blinks on and off on Bill's shirt front while passers-by stare and nudge each other.

They walk in silence for a while. Trina looks at Bill with vast awe and respect. There is something truly magnificent in the way in which he handles his cane. He has the look of a free man about him.

BILL

(almost to himself)

I suppose I'll have to get you a place to sleep tonight.

She doesn't answer but walks happily along at his side. Her manner is that of one who has completely entrusted her destinies to another. She is like a little dog to whom somebody has been kind and who will trot forever at her master's heels.

Continued—[176]

28. CONTINUED

BILL

What's your name?

TRINA

Trina.

He grunts and scowls. He doesn't care for the name.

TRINA

What's yours?

BILL

Bill.

TRINA

Bill . . .

She speaks the name almost inaudibly, with a tender wistfulness, as we

DISSOLVE TO:

29. EXT. VAG ENCAMPMENT—NIGHT CLOSE SHOT

of a street post sign of enamelled metal, upon which is lettered: PARK AVENUE.

CAMERA TRUCKS BACK and we see that it is tacked onto the side of a miserable shack. CAMERA DRAWS BACK FURTHER to take in the backs of Bill and Trina, standing on the fringe of the vagrants' encampment. Trina still has on the Inverness cape belonging to Bill's outfit and he still has on his ballyhoo clothes. Music from an accordion being played nearby can be heard and will continue, more or less distinctly, until the fade out.

30. TWO SHOT

Bill and Trina.

BILL

Here we are, Whoosits.

(he waves his arm in an all-embracing gesture covering the encampment)

Vagville-on-the-Hudson . . . the fast-est growin' community in the East. One o' these days when I'm in the mood I'm goin' to start a Chamber of Commerce here to tell the world about it.

(he pauses)

How d'you like it?

As Trina looks about.

[177]

31. SLOW PAN SHOT

from their angle, of an encampment covering an acre or more of space—a typical squatters' area with no two shacks alike and a general appearance of things thrown together. Nevertheless we get the feeling of a community about the place and of

more or less permanence. In the moonlight, which softens the drab ugliness of the encampment, it is not without a certain picturesque charm. Some of the shacks are dark, their occupants obviously sleeping; in others lights gleam out and, inasmuch as it is a warm summer night, some of the doors are open giving glimpses of family life within. The PAN SHOT not only takes in details of the encampment but its surroundings. On one side are docks and the river with its vague bulks of shipping and the reflected lights of anchored craft gleaming in the water. In the immediate b. g. are railroad tracks and trains, and in the far b. g. the towering skyscrapers. The tall buildings loom with a vague menace, like a forest surrounding a little clearing.

## 32. TWO SHOT

as Trina completes her survey of the place.

TRINA

(with the deepest sincerity)

It's swell!

(she shakes her head)

Gee—I been in the city a whole year an'  
I never even knew there was such a place.

BILL

That's one of the best things about it—  
the privacy. It's the only way to live—  
no rent—no taxes—

(gestures toward the river)

—runnin' water, a whole river of it—and  
the dump is lousy with southern exposure.

The long suspended, mournful wail of a locomotive wafts into the scene.

BILL

That's what I like the best. Them train whistles—to remind you of other places. You hear 'em all night. Don't you love the sound of it?

TRINA

It's scarey, kinda.

Continued—[178]

### 32. CONTINUED

BILL

(disgusted)

Nah.

(he looks toward the railroad tracks)

.“Gangway! Get outa my way! Here I come!” That's what it says.

(the whistle comes again, fainter from the distance, and Bill speaks dreamily)

Like a long distance call.

(with an abrupt change)

Come on.

They start walking.

### 33. TRUCKING SHOT

as they walk through the encampment—the purpose of which is to establish, in passing, details of the atmosphere of the encampment. Trina takes in every detail with eager interest. Occasionally Bill

waves a greeting to somebody within a shack. CAMERA takes in, in passing, the shack in which the accordion is being played—the little group within the shack consisting of perhaps a man, his wife and two or three children—looking mysterious and eerie in the kerosene lamp-light within the shack.

TRINA

Which one o' these houses do you live in?

BILL

None o' them. I don't go for houses. Mostly I sleep in the open. An' when it rains I take my choice. They're all my pals here an' I can bunk with any one o' them.

TRINA

They must be swell people.

BILL

The best. Funny . . . when people got nothin' they act like human beings. We get along fine here—it's like a big, happy family.

The sound of loud and disputatious voices comes into the scene.

BRAGG'S VOICE

Keep outa here, I tell you! I can't pay you if I haven't got it, can I?

Continued—[179]

## 33. CONTINUED

FLOSSIE'S VOICE

I'll find some way to collect!

As Bill and Trina pause and look in the direction of the voices, CAMERA SWINGS OVER to take in Bragg's shack, a miserable, make-shift affair consisting of a patchwork of tents, a tarpaulin and tar paper. The glimpse we get of the interior of the shack is on a par with its general character—filthy, unkempt and stark.

Bragg, a middle-aged unkempt man in vest and shirtsleeves, is standing in his doorway arguing with Flossie, a blowsy female in a gaudy kimono, whose hoarse, whiskey voice and general appearance tip off immediately what she is—a broken down prostitute. She is in her late thirties.

BRAGG

What'll you do? Sue me?

FLOSSIE

I don't let anybody beat me outa what they owe me.

## 34. MED. CLOSE SHOT

of the two.

BRAGG

I didn't say I wouldn't pay you, did I?

FLOSSIE

You've had the money a dozen times. You got no intention of payin', you crummy heel!

BRAGG

(angrily)

Go on, you cheap moocher, before I slap  
you down!

PAN as she retreats before his threatening ad-  
vance. As she backs up, Bill and Trina, who have  
been watching, come into the shot and Bragg is  
stopped by Bill's voice.

BILL

Hold it, Bragg.

(he looks from Bragg to Flossie)

What's wrong?

[180]

### 35. GROUP SHOT

favoring Bill.

BRAGG

Imagine that played-out has-been! What  
I shoulda done is let her have it. Did'ya  
hear what she called me?

BILL

What's it all about?

FLOSSIE

He owes me some dough an' he won't  
pay.

BRAGG

A coupla measley smacks. She put me  
on the cuff—you know how it is. An' if  
I don't give her the dough what does—

BILL

But you will give her the dough.

BRAGG

(shifting)

I can't pay what I haven't got, can I?

Bill takes two dollar bills out of his pocket.

BILL

It just so happens I got paid off to-night . . .

(he hands the greenbacks to Flossie)

Here—

(to Bragg)

Now you owe it to me, Bragg.

### 36. ANOTHER ANGLE

Favoring Flossie, as she looks at the greenbacks, then at Bragg, wordless. She stumbles out of the scene.

BRAGG

You shouldn't'a gave her that two bucks, Bill. She'll only spend it for booze.

Continued—[181]

### 36. CONTINUED

BILL

That's her business.

(sternly)

No white man'd trim a woman outa that kind o' money.

(he takes Trina's arm)

You owe me two bucks.

Bill exits with Trina.

### 37 and 38 OUT

39. TRUCKING SHOT

With Bill and Trina as they walk away. We see more of the encampment ground as they walk along in silence for a moment.

BILL

(meditatively)

I was goin' to ask Flossie to put you up for the night, but maybe that's not so hot. If she spends that money for gin she won't be much of a roommate.

TRINA

(timidly)

I could sleep in the open, I guess.

BILL

Nah. That takes trainin'.

(he reflects)

I got it! Bear left—

As they turn left, CAMERA PANS, holding them in shot as they approach another shack.

40. MED. CLOSE SHOT

at shack, as Bill leads Trina up to the open doorway—thru which can be seen Ira, an elderly, white-haired man of about sixty (Henry Walthall type) seated a rough deal table reading by the light of a kerosene lamp. As Bill and Trina look inside:

CUT TO:

41. INT. IRA'S SHACK

CLOSE SHOT

of Ira reading. Over this the voice of Bill.

Continued—[182]

## 41. CONTINUED

BILL'S VOICE

What's the good word, Ira?

Ira looks up, squints at the figures in the doorway and rises picking up the book as he does so.

## 42. MEDIUM SHOT

Shooting past Bill and Trina in doorway, toward Ira as he reads aloud from the book.

IRA

(reading)

"And seeing the multitudes He went up into the mountain and His disciples came unto Him and He taught them, saying: Blessed are the poor in spirit, for theirs is the Kingdom of Heaven."

(he looks up)

That's the good word.

## 43. CLOSE SHOT

Toward Bill and Trina in doorway.

BILL

That looks like that Gideon Bible I swiped out of a hotel last week.

## 44. CLOSE SHOT

Ira.

IRA

Bibles can't be stolen. The good word is free. I only wish I could get you to read it, William.

45. CLOSE SHOT

Bill and Trina.

BILL

I did. I skimmed through it one night. It's kinda repetitious in spots, but there's good readin' in it. There's one place—the Songs of Solomon—great stuff!

(he turns to Trina)

Whoosits—meet Ira. He used to be a minister, but now he's a night watchman.

[183]

46. THREE SHOT

Trina and Bill and Ira. Trina curtsies. Ira smiles and bows slightly.

IRA

How do you do.

TRINA

Nicely, thank you.

BILL

Yeah, nicely—only she ain't got a place to sleep. I thought maybe after you checked out she could camp here for the night.

IRA

(simply)

Welcome.

BILL

When do you go to work?

IRA

Eleven-thirty.

47. MED. CLOSE SHOT  
toward doorway.

BILL

(lighting cigarette)

O. K. She'll check in about twelve.

TRINA

I thank you from the bottom of my heart.

BILL

Nuts. Come on.

As they exit:

DISSOLVE TO:

48. EXT. RIVER BARGE  
CLOSE SHOT

of the surface of the river with a path of moonlight in it. The music of the accordion comes into the scene from the shore.

A lit cigarette flicks through the air and lands in the water, going out with a sizzle. CAMERA PULLS BACK TO WIDER ANGLE showing the reflection of Trina and Bill leaning against the rail of a barge above.

[184]

## 49. TWO SHOT

Trina and Bill. They are at the rail of a long lumber barge. Moonlight streams down on that end of the barge but the rest of it is in inky blackness. There are no lights anywhere; the only illumination comes from the moon.

BILL

The reason I like to sleep on this barge is because there's no roof on it.

TRINA

It must be wonderful with the water rockin' you—like a cradle, sorta.

She gazes out on the water. The expression on her face indicates that she is supremely happy and contented.

TRINA

Looka them ships there with the sails. They look so kinda peaceful and contented like . . .

BILL

(disapprovingly)

Gwan. They been lyin' here for years rottin' away with barnacles. That's what you get when you're anchored.

TRINA

(defensively)

Still an' all, it's restful.

BILL

Restful!

(with vast disgust)

So's a graveyard.

CAMERA PULLS BACK TO WIDER ANGLE as he abruptly walks away out of the section of moonlight and into the Stygian gloom of the rear of the lumber barge. He disappears completely. Trina stares into the dark a moment.

TRINA

Where are you?

BILL'S VOICE  
(from the gloom)

Here.

TRINA

Where?

[185]

50. SHOT OF DARK SCREEN

as though photographing the inky gloom that envelops the rear of the barge. The small lettering: GILSEY HOUSE COFFEE flashes on and off.

BILL'S VOICE

Here.

51. CLOSE SHOT

Trina.

TRINA

What are you doing?

52. SHOT OF DARK SCREEN

BILL'S VOICE

Takin' off my clothes.

(a pause)

53. MEDIUM SHOT

taking in Trina in the moonlight and part of the dark section of the barge.

BILL'S VOICE

I'm goin' in for a swim. Nothin' like a bath before you hit the hay.

(pause)

That's about the only thing I do regular—bathe.

TRINA

I can swim. I love to swim.

(pause)

I bet the water's cold, kinda.

In the silence that follows we hear Bill whistling an accompaniment to the tune being played by the accordion.

54. CLOSEUP

Trina. Over this, the sound of Bill's whistling. Suddenly we see Trina's eyes follow something upward.

55. LONG SHOT

toward far end of barge. Dimly we see the white, naked figure of Bill poised on the rail for an instant; then he makes a beautiful dive into the phosphorescent, moonlit water.

[186]

56. CLOSE SHOT

surface of the water as Bill comes up, spewing water.

BILL

(calling up to Trina)

Warm as milk!

(he treads water)

Come on in!

57. CLOSE SHOT

Trina.

TRINA

(frightened)

Should I?

## 58. CLOSE SHOT

Bill.

BILL

Want me to come up there and throw  
you in?

## 59. CLOSE SHOT

Trina.

TRINA

No.

BILL'S VOICE

(in a definite tone of command)

Then come on in.

TRINA

(helplessly)

If I had a bathin' suit—

## 60. CLOSE SHOT

Bill. All this time he has been treading water.

BILL

You got one—the one you were born  
with. That's the one I'm usin'.

[187]

## 61. CLOSE SHOT

Trina.

BILL'S VOICE

I'll give ya one minute—if you're not  
in here by then, I'll come up an' throw  
you in—clothes an' all.

Trina begins to undress quickly.

CUT TO:

## 62. EXT. DOCK

## MED. LONG SHOT

of a nearby dock. We see a man's figure standing there, watching.

## 63. MED. CLOSE SHOT

of the man. It is Bragg. He takes a keen interest in the proceedings on the barge.

## 64. EXT. RIVER BARGE

## CLOSE SHOT

Bill, floating, his hands moving slowly to keep himself on his back. His eyes are closed, his head thrown back. He sings or hums an accompaniment to the song of the accordion. (I suggest the song be *Cielito Lindo*.)

## 65. MEDIUM SHOT

Trina, completing her undressing, stands naked in the moonlight. The angle will be shot from the point of view of censorship so that it will suggest only beauty and in no way sex.

## 66. CLOSE SHOT

Bill, as he comes out of his float and treads water, looking up toward the barge.

## 67. TOP SHOT

of a lovely naked female figure poised on the rail of the barge, then Trina dives into the water.

## 68. MEDIUM SHOT

surface of the water, as Trina comes up from her dive, near Bill.

## 69. CLOSE SHOT

Bill and Trina in the water.

BILL

Race you.

TRINA

Where to?

BILL

To the moon.

They start swimming into the path of the moonlight.

CUT TO:

## 70. EXT. DOCK

## CLOSE SHOT

Bragg. He watches the scene with desireful eyes.

FADE OUT.

[189]

FADE IN:

## 71. INT. BILL'S SHACK—DAY—CLOSE SHOT

A battered old ironing board, beside which soapy hands are vigorously scrubbing some washing.

CAMERA TRUCKS BACK and we see Trina, her sleeves rolled up, an apron around her dress, sweating, engaged in washing clothes. She is busy as a bee, attacking the washing with a ferocity that is almost comic. This is a characteristic of Trina that we will emphasize throughout the play. She

is hardly ever seen hereafter without being engaged in housework of some kind or other, and whatever she does she does with a terrific energy.

The shack itself is pathetically primitive, with evidences here and there of Trina's handiwork in her efforts to brighten the place and make it more homelike. A cot, a couple of steamer chairs, a rough deal table, a rigged up clothes-line with some washing hung on it—these are the principal items of furnishings in the shack. There is one other—a stove. It is a battered, an ancient, a disreputable looking thing—a patchwork of other stoves—the sort of stove that would be the despair of any good housewife.

Up to the open door of the shack comes Flossie, with hang-over written all over her.

## 72. CLOSE SHOT

At door as Flossie comes in and stares blearily at the furiously energetic Trina. An expression of owlish despair comes across Flossie's face as she watches Trina for a moment in silence.

FLOSSIE

'Lo, Trina.

## 73. MED. SHOT

Trina looks up, blows away a strand of hair which has gotten into her eyes and greets Flossie without stopping work.

TRINA

Hello, Flossie.

Flossie comes into the shack. Trina continues working. Flossie squats near the stove and lights a cigarette from its embers. Having done this, she takes a seat and

Continued—[190]

### 73. CONTINUED

gloomily continues to watch Trina, who scrubs frantically. The sight of so much household energy seems to cause Flossie growing dismay.

FLOSSIE

(finally, with a note of querulous irritation  
in her voice)

Where d'you get all that energy from?  
Every time I see you, you're workin'.

TRINA

I was outa work for a whole year.

(scrub, scrub)

Makin' up for lost time, I guess.

(scrub, scrub)

This kinda work's not real work. It's fun.

You're the only woman I ever knew who  
had seven wash days a week.

TRINA

Bill's particular.

(scrub, scrub)

Anything that goes next to his skin's  
gotta be clean—

(scrub, scrub)

I guess he's the cleanest man in the world.

(scrub, scrub)

One o' these days maybe Bill'll get me a washin' machine. But that ain't so important just yet . . . The main thing's a stove.

(she looks up proudly)

Bill's goin' to get me a real stove.

#### 74. CLOSE SHOT

Flossie.

FLOSSIE

(pause)

I'd like to see some man offer me a stove.  
I'd tell him where to put it.

What's the matter with the one you got?

[191]

#### 75. CLOSE SHOT

Trina, scrubbing.

TRINA

You can only make stew on it. I could cook Bill some wonderful things if I had a real stove. An' he's gonna get me one, too.

#### CONTINUATION SCENE 74:

FLOSSIE

(skeptically)

When?

TRINA'S VOICE

Pretty soon. Soon's he gets the money.

FLOSSIE

Whoever heard of a bindlestiff gettin' money!

## 76. TWO SHOT

Trina stops scrubbing and wipes her brow with her sleeve.

TRINA

What's a bindlestiff?

FLOSSIE

A 'bo with ants in his pants—can't stay put—except maybe in jail.

TRINA

(indignantly)

Bill can make all the money he wants—if he wants to. An' he's no bindlestiff. He's got personality, Bill has. He's different.

FLOSSIE

If he was different would he keep you here in a dump like this?

Continued—[192]

## 76. CONTINUED

TRINA

What's the matter with you, Flossie? How can you say things like that? This ain't a dump. Not to me, it ain't. It's—it's a sorta—I can't find the word . . . You know them things they got in the middle o' the streets—where people can stay till the traffic's safe?—wha-dya-call-'em?

## FLOSSIE

Safety zones.

## 77. CLOSE SHOT

Trina.

## TRINA

That's it. That's how I feel about this place—like a sort of clearin' in the forest—quiet an' safe an' peaceful . . .

Into the shot suddenly comes the brazen call of a train whistle. The sound causes a spasm of fear and hate to flash across Trina's face.

## 78. TWO SHOT

Trina's voice is hard as she continues:

## TRINA

That's the only thing I don't like—them train whistles. They plague the life outa you, night an' day.

## FLOSSIE

(looking up toward the roof of the shack)

What's that?

As Trina looks up—

## INSERT: CLOSE SHOT

Section of roof. A space about three feet square has been cut in the roof of the shack, directly over the cot. There is a sliding trap door arrangement which is operated by a rope so that the space can be opened and closed at will by anybody below.

78. CONTINUED  
BACK TO SCENE

TRINA

Oh, that. That was Bill's idea. He's an outdoor man, he is. He can't stand to sleep under a roof.

FLOSSIE

It's all right for him—but how about you? The drafts here are sumpthin' awful. You'll catch a cold sure. I've had one ever since I been here.

(she pauses, sniffing)

You don't happen to have anything good for a cold? Scotch, or Bourbon, or even gin?

TRINA

No.

FLOSSIE

(disgusted; getting up from her seat)  
Does that guy give you *anything*?

TRINA

(flares up)

He gives me everything! Everything anybody would want.

FLOSSIE

Except maybe a stove.

Trina goes over to the dilapidated, makeshift stove and stares at it.

79. CLOSEUP

Trina, as she stares at the stove.

INSERT: CLOSE SHOT

Of the stove.

DISSOLVE TO

80. INT. HARDWARE STORE ON SIXTH AVENUE—DAY—CLOSE SHOT

Of a stove—an ornate specimen full of gleaming color and yclept "Queen of the Kitchen."

Continued [194]

80. CONTINUED

CAMERA PANS from the stove past other stoves and hardware and around to the plate glass window of the store, against which we see the flattened face of Trina. She is staring at the particular stove much as though it were an altar and she were worshipping. The expression in her eyes indicates that she is looking at something which is much too good for her.

CAMERA DRAWS BACK TO WIDER ANGLE, taking in more of the display window and pedestrians passing back and forth outside. The periodic roar of the elevated will be heard throughout this scene in addition to other appropriate street noises.

Suddenly Bill comes along, sees Trina and comes up behind her. There is a grin on his face at the prospect of surprising her. He looks into the window to see what she is so engrossed with and a frown comes on his face when he notices the subject of her rapt scrutiny. He says something which we cannot hear on account of the window glass. She starts, turns and replies, also inaudibly because of the intervening window.

CUT TO:

81. EXT. HARDWARE STORE—MED. CLOSE SHOT

Shooting past Bill and Trina into window.

BILL

What're you doin' here?

TRINA

I was just sorta admirin' that stove.

(she points to the particular one)

That one.

(pause)

It's beautiful, ain't it? An' cheap. Only five dollars.

Bill grunts with surprise, and she adds hastily:

TRINA

Five dollars down, that is, an' only two dollars a month for only twelve months—an' no interest.

BILL

And no interest's right, as far's I'm concerned. I don't go for anything on the installment plan.

[195]

82. REVERSE SHOT

With passersby b.g.

TRINA

(dreamily)

In only a year the stove'd be ours . . .

BILL

A year? You think I'm gonna hang around this town a year? I never play any town more'n thirty days. I been hangin' around here too long, as it is.

TRINA

(dreamily)

It's such a beautiful, all-around kind of a stove . . .

BILL

Forget it.

TRINA

But of course, we can start with one of the smaller ones . . . They got one you can get by payin' only two dollars down an' only a dollar a month.

BILL

Forget it. G'wan home

She hesitates, then turns and starts off.

### 83. MED. SHOT

Of the two, with shopwindow b.g.

BILL

What's for supper tonight?

TRINA

Stew.

She pauses with a half glance toward the window.

BILL

Gahn home.

She comes over and beckons to him as though to whisper something into his ear. He bends down but instead of whispering she kisses him, with people passing right by paying no attention whatever. Having kissed Bill, Trina turns and walks away. He stares after her, the severity

Continued—[ 196 ]

### 83. CONTINUED

of his face melting in a puzzled smile; then he shakes his head, scratching the back of his head abstractedly. He turns and looks at the stove, then digs into his pocket and brings out a few silver coins which he stares at. Then he looks out at the stream of people passing to and fro. He recognizes somebody and sends out a hail.

BILL

Hey—Bragg!

### 84. MED. SHOT

Toward street. Bragg is seen among a number of passing pedestrians. He stops. PAN WITH HIM as he comes over to Bill.

BILL

I been lookin' for you. How about that two bucks you owe me?

BRAGG

What're you houndin' me for? It's only a week since—

BILL

(interrupts)

I'm no Flossie. It don't pay to stall me.

85. CLOSE SHOT

Of the two. Pedestrians b.g.

BRAGG

Stall you? I been workin' my head off  
tryin' to get dough to pay you off.

(with a martyred look)

Why, I'm workin' right now.

BILL

You don't look it. What kind o' work?

BRAGG

Servin' a summons. What I mean is—  
tryin' to serve a summons. You get two  
bucks a throw, but this one's so tough  
there's a bonus goes with it. Ten bucks  
for this one.

BILL

Well, why don't you serve it an' get your  
money?

[197]

86. MED. CLOSE SHOT

Favoring Bragg.

BRAGG

Why don't I? What d'you suppose I  
been tryin' to do for three days? It's for  
a dame in a show. You can't get to her.

BILL

What d'you mean you can't get to her?

BRAGG

She's got a bodyguard.

BILL

What d'you have to do with a summons?

BRAGG

Just hand it to the party it's made out for.

BILL

Lemme see it.

Bragg takes the summons out of his pocket and hands it to Bill, who looks at it.

## 87. REVERSE ANGLE

Favoring Bill.

BILL

An' for handin' this hunk o' paper to a dame you get ten bucks?

BRAGG

Cash.

BILL

An' you can't do it?

BRAGG

I'm not the only one. I'm the third guy that's tried this week.

BILL

(thoughtfully)

Ten bucks, huh . . . Suppose I serve this summons for you? I could use five bucks. Willya split?

Continued—[198]

87. CONTINUED

BRAGG

I'm tellin' you, it's impossible to get to her. She's got a bunch o' gorillas with her day an' night.

BILL

Willya split?

BRAGG

Sure. But you can't get to her.

Bill looks at the piece of paper in his hands.

INSERT: CLOSEUP

Summons, appropriately made out, to be served on one Miss Fay La Rue. IRIS DOWN to that section of the insert referring to Miss La Rue . . .

DISSOLVE TO:

88. EXT. FRONT OF THEATER MARQUEE—  
DAY—MED. CLOSE SHOT

The electric lights—unlit—spell out:

FAY LA RUE

in

Revue of Revues

DISSOLVE TO:

89 to 94. INT. THEATER—SHOTS OF STAGE SHOW

Opening with a full shot of the stage. Part of the Revue is being enacted. A couple of comics are doing their stuff with a chorus b.g. doing a typical Busby Berkeley number. Orchestra music comes

over the shots. (Note: For this routine, I suggest we get a couple of real musical comedy comics and do a fragment of a real musical show. Or perhaps we can find some desirable stock stuff to serve the purpose—which is merely to introduce part of the show that Miss La Rue is in.)

At the conclusion of the number the comics and chorus exit as CAMERA DRAWS BACK to take in the audience applauding.

#### 95. CLOSE SHOT

Orchestra, as they go into a new number.

[199]

#### 96. FULL SHOT

Of stage, which darkens. A spotlight hits the wings and out comes Fay La Rue with a typical Eva Tanguay entrance and dressed in the most revealing costume possible. She goes into a number which will have to be especially written for this purpose, the nature of the song being definitely part of the scene. The title of the song is: "What Have You Got For Me?"

#### 97. MOVING SHOT

With La Rue as she struts about the now empty stage, shrouded in darkness except for the spotlight which follows her, and sings the verse of the song—at the conclusion of which she stops at stage box left and addresses the first chorus of her song to the occupant of that particular stage box.

CAMERA SWINGS AROUND to CLOSE SHOT OF STAGE BOX, where a plump elderly gentleman is seated with a party. He beams and

colors with embarrassment at the fact that he has been selected by Miss La Rue for the signal honor of having the song directed at him. The song is exceedingly Frenchy and the embarrassment of the plumpish gentleman increases.

INTERCUT:

98. CLOSE SHOT

Of La Rue, singing the chorus and registering the appropriate emotions.

99. MED. SHOT

Section of audience, smiling at the embarrassment of the plumpish gent.

100. MOVING SHOT

With La Rue, as she concludes her song and starts the second chorus, strutting over to the extreme right of the stage with spotlight following her. Having successfully embarrassed the occupant of stage box left, she now goes through the same procedure with the occupant of stage box right, attempting in voice and manner to top the effect of the first chorus. She is the embodiment of seduction as she coos her song.

Continued—[200]

100. CONTINUED

CAMERA SWINGS AROUND TO CLOSE SHOT of the occupant of stage box right. It is Bill.

INTERCUT WITH:

101. CLOSE SHOT

Of La Rue, singing.

## CONTINUATION SCENE 100:

Bill waits for the conclusion of the chorus, which contains the line: "What have you got for me?"—upon which he rises and says:

BILL

Sumpin'—

## 102. CLOSE UP

La Rue, taken aback at this unexpected response.

## 103. MED. SHOT

As Bill climbs over the stage box and leaps onto the stage.

## 104. AUDIENCE SHOT

There is laughter and applause from the audience, who think that perhaps this is part of the show.

## 105. CLOSE SHOT

Members of the orchestra, their expressions revealing that this is certainly not on the program.

## 106. TWO SHOT

Bill and La Rue, as he faces her on the stage, taking the summons out of his pocket.

BILL

Here's what I got for you.

He hands the summons to the amazed La Rue, who is so startled at this unexpected development that she accepts it. The music has stopped now.

## 107. MED. SHOT

In wings. Two or three hard-looking gents are standing in the f.g., with actors, chorus girls, stage hands and the like b.g. The expression on the faces of the muggs indicate they are just as much surprised by this development as anybody else.

## 108. TWO SHOT

Bill and La Rue, as Bill explains:

BILL

A summons.

(he indicates the audience with a sweeping gesture)

An' you can't say I ain't got witnesses.  
The show's swell. I'm gonna thank the  
lawyer for gettin' me tickets.

With a genial wave of his hand he turns and starts off the stage toward the wings, CAMERA PANNING WITH HIM.

## 109. MED. CLOSE SHOT

In wings, as the bodyguards of Miss La Rue bar Bill's way. One of the tough muggs sticks his face close to Bill's and demands:

MUGG

Where d'yuh think you're goin'?

BILL

(in a deceptively mild voice)

I think I'm gonna collect five bucks for servin' that summons.

## ONE OF THE OTHER MUGGS

I think you're gonna need it for hospital expenses.

He gives Bill a short, wicked jab in the face and Bill leaps into action.

## 110 to 116. SHOTS OF FIGHT

We stage a beautiful fight in which Bill gives an extraordinarily good account of himself. As La Rue rushes off the stage into the wings, Bill knocks one of the muggs into a group of chorus girls who shriek as they try to get out of the way. Stage hands leap into battle and a

Continued [202]

## 110 to 116. CONTINUED

near riot develops backstage, with Bill fighting like an inspired warrior, enjoying himself immensely, knocking people over and getting slugged himself, while the surrounding scenery is wrecked.

INTERCUT shots of the curtain being rung down while the shrieks of the chorus girls penetrate to the audience out front.

At the high point of the fight:

DISSOLVE TO:

## 117. INT. BILL'S SHACK—DAY—MED. SHOT

Trina busy at the forlorn, makeshift stove, working on a stew. Here, as always when we see Trina at home, she is as busy as four people. Little beads of perspiration on her forehead from the heat of the stove. She always exudes an anxious aura when she is cooking, she is so terribly eager to have the results worthy of Bill.

Bill enters through door b.g. She hears him come in, stops and, as he walks over to the table, she comes and kisses him absently, her mind on the stew. Bill notices on the table a copy of a bible and looks at it suspiciously.

BILL

What's this?

TRINA

That? Oh, Ira gave it to me.

(she goes back to the stew)

He wants me to read it when I got nothin' else to do.

She adds pepper to the stew, worrying about the flavor. As she does so, Bill sits on the edge of the table and picks up the bible, ruffling through it with his fingers.

BILL

There's one thing in here you don't wanna miss . . .

TRINA

I do wish I had some kind of a stove.

BILL

(reads from the bible idly)

"The song of songs which is Solomon's . . ." Get this . . . "Thy cheeks are comely with rows of jewels."

## 117. CONTINUED

TRINA

It's hard to cook with this kind of a fire—

BILL

(reads)

"Behold, thou art fair, my love . . .  
Thy lips are like a thread of scarlet."

TRINA

You can't get an even heat.

## 118. CLOSE SHOT

Bill reading.

BILL

"Thy neck is a tower of ivory, thy breasts are like clusters of grapes. How fair and how pleasant thou art, oh love, for delights."

He closes the book and throws it on the table, staring morosely at Trina.

## 119. CLOSE SHOT

Trina, as she dabs her finger into the stew and licks the end of it, a worried expression on her face.

## CONTINUATION OF SCENE 118

(Close Shot of Bill)

BILL

(explosively)

You're a heck of a lookin' woman for a man like me.

120. MED. CLOSE SHOT TRINA

Trina, accustomed to this sort of thing, is not greatly alarmed.

TRINA

Uh-huh. I don't know if this is goin'  
to be very good stew . . .

Continued [204]

120. CONTINUED

BILL

(coming into scene to her)

Look at you! Skinny—no thighs—no  
hips--

(he slaps her on the fanny)

No nothin'!

TRINA

I bet you I put the potatoes in too soon.

CAMERA PULLS BACK TO WIDER  
ANGLE as Bill sits on a nearby chair and continues.

BILL

A man like me oughta have a woman  
who's a woman—a woman who's got some-  
thin' a man can get hold of.

TRINA

(nods her head)

Yes, sir, that's just what I did—put the potatoes  
in too soon.

BILL

Who wants to grab hold of a lotta bones?  
That's all you are—bones. Did you know  
that?

TRINA

(absently)

Well . . . I'm young, kinda . . .

She is too busy with the stew to even turn around.

BILL

That don't make no difference.

TRINA

Maybe it does. Maybe I'll sorta fill out—after.

BILL

Nope. You'll never look like a woman. It ain't in you to ever look like one.

TRINA

What difference does it make, as long's you're good to me?

Continued [205]

## 120. CONTINUED

BILL

Huh! I'm not good to you. Don't get that idea in your head. That's the way to spoil 'em—bein' good to 'em. You've gotta step around if you wanna stay with me—or get your teeth knocked out.

(pause)

Huh! I oughta knock 'em out anyway.

## 121. CLOSE SHOT

Trina. She stirs the stew violently, wiping the sweat off her brow with her sleeve. Over this the voice of Bill—

BILL'S VOICE

Come here!

She turns, but without taking her eyes off the stew.

122. MED. TWO SHOT

As Trina, still looking backward at the stew, obediently comes over to where Bill is seated nearby.

TRINA

You need tomatoes to get the taste . . .

He reaches forward, grabs her hand and yanks her down on her knees before him. She looks up at him and for the first time notices the signs of slight bruises on his face, and an expression of terror comes over her own face as she sees the evidence of his fight.

TRINA

Bill! What happened to your face?

BILL

Never mind my face. Look at my neck!

(he points to his neck)

See those red spots? Know where they come from?

(he jams her head back in the crook of his arm and raises his fist as though to strike her—then lays it gently to her cheek)

Li'l old Whoosits.

She stares at him a moment, then impulsively, forgetting the stew and everything else, she reaches up skinny, hungry arms and glues her lips to his in a kiss which is strikingly, outrageously in contrast to her general mousey, timid behavior.

## 123. CLOSE SHOT

Of the two. Bill is amazed at the ferocity of the kiss and finally yanks her lips away from his and stares at her with wonder.

BILL

You women get some phony ideas, all right.

## 124. WIDER ANGLE

As he yanks her to her feet.

BILL

Come on—get to work! And if that stew's burnt I'll pour it down your back.

She returns to the stove and resumes her fussing with the stew. He watches her a moment, then he turns and on tiptoes sneaks out of the shack, CAMERA PANNING WITH HIM TO DOOR. Hold on entrance to shack. An instant later Bill comes in, carrying the stove. In the same tiptoe fashion he manages to bring the stove into the shack and set it down. PAN BACK to Trina as, turning for something, she sees the stove and stops.

## 125. CLOSE SHOT

Trina, as she stares open-mouthed at the beautiful new stove.

## 126. MED. CLOSE SHOT

At stove, as Trina comes into scene and looks from the stove to Bill. She sinks to her knees, in front of the stove, touching it to see if it is real.

He looks down at her with an indulgent grin on his face, half ashamed of the emotion that her reaction is causing him. Trina's feeling is too great for words. She almost caresses the stove, as we

FADE OUT

[207]

FADE IN:

127. EXT. SIDE STREET OFF BROADWAY—  
MORNING MEDIUM SHOT

A group of street gamins, perhaps interspersed with one or two adults of the idle, kibitzing type, are clustered around a pair of spangled legs draped over the side of an automobile. The kids are all looking upward, as are the adult kibitzers, and passersby also throw curious glances upward.

CAMERA PANS UPWARD to show Bill in an Uncle Sam ballyhoo outfit and on stilts, seated on the top of a parked Ford coupe. Traffic is passing b.g. The length of Bill's stilts enables him to sit on the top of the car in perfect comfort, his stilted legs resting on the pavement below. On front and back he carries the advertisement of his ballyhoo, which I suggest should be a theatre advertisement—if possible tying up with some other Columbia picture which will be playing about that time.

128. REVERSE ANGLE

shooting from an elevation behind Bill down toward the group of kids and passersby, all staring upward, Bill's head and shoulders are slightly bent over something upon which he is writing.

## 129. CLOSEUP

Bill, busily engaged in writing with an indelible pencil upon a baseball.

## INSERT: CLOSEUP

Baseball, as Bill's hand completes the following partly written inscription:

To my pal. Joey  
from Babe Ruth

## 130. MED. CLOSE SHOT

Bill, as, having completed this, he sticks the pencil into a side pocket and stands erect, CAMERA DRAWING BACK to FULL SHOT as he does so. He towers fully fifteen feet in the air as he stands upright and, baseball in hand, begins the measured, stilted walk down the side street.

CAMERA TRUCKS AFTER HIM as he walks along followed by the kids, who troop after him in a manner which indicates that wherever he goes he has his train of juvenile admirers.

[208]

## 131. CLOSE SHOT

Bill, as he walks along, looking down on passers-by stunted by his side.

## 132. TRUCKING SHOT

from Bill's viewpoint, as though CAMERA were Bill looking down on the passing throng from a fifteen foot height. .

133. MEDIUM SHOT

featuring a shabby brownstone building as Bill comes into scene and pauses before it. It is sandwiched in between two other buildings devoted to business purposes—one of the fast disappearing brownstone fronts on the west side of New York in the Forties. As Bill pauses before the building the second floor windows are on a level with his head and shoulders. The group of children dutifully pause with him. Through an open second-story window Bill looks in and sees:

134. INT. ROOM IN BROWNSTONE  
MEDIUM SHOT

shooting past Bill's head at window, into room. It is a drab living-room, reeking of genteel poverty—part of a small flat consisting probably of a living room, bedroom and perhaps kitchenette and bath. The other rooms are not seen but are merely suggested by the set.

135. CLOSE SHOT—REVERSE ANGLE

Shooting out through window toward Bill looking in. He purses his lips and emits a piercing whistle.

136. FULL SHOT

of room. Out of the adjoining bedroom hobbles "the kid"—a boy of about eight with the pinched, haggard face of an incurable cripple. One of his legs is in a brace. The kid's face lights up joyously as he recognizes Bill in the opening of the window.

BILL

Hello, Mugg.

KID

(hobbling forward eagerly)

Hello, Stilts! Gee—I thought you died or somethin'. Where you been?

[209]

137. MED. CLOSE SHOT

at window as the kid hobbles into scene.

BILL

Where're the Yanks playin' this week?

KID

Chicago.

BILL

All right. You wanted Babe Ruth to autograph a baseball for you, didn't you?

The kid nods eagerly.

BILL

And I hadta put it up to him, didn't I?

KID

(tremulously)

Did he—did he—

BILL

He sure did.

He reaches into the window and hands the baseball to the kid. The kid takes the baseball and stares at it, reading the writing on the ball with an expression of reverent, almost incredible awe in his eyes.

138. CLOSE SHOT

Kid.

KID

Gee, Stilts! Gee!

(he stares at the baseball)

Gee!

139. TWO SHOT

BILL

I hadta go all the way to Chicago to see  
the Babe.

KID

Gee, Stilts, thanks! Did you hop a  
freight?

BILL

Rode the rods all the way. Ain't got the  
cinders outa my hair yet.

Continued [210]

139. CONTINUED

KID

Gee! Thanks!

(he looks at the writing on the baseball  
and points to it)

And the Babe wrote this hisself?

BILL

In person!

140. FULL SHOT

of room, as the kid's mother enters from the  
kitchen. She is a Bertha Mann type: a middle-  
aged woman who somehow suggests the shabby,

genteel poverty of the flat—a pale and beaten creature. The kid joyfully holds aloft his precious trophy as he sees his mother.

## KID

Look, maw—look! The baseball Stilts promised me! With Babe Ruth's auto-graphed. He signed it hisself. Stilts went all the way to Chicago t'get it!

(he stares at the ball, still refusing to believe it's true)

Gee!

He throws the ball and stumps pathetically after it, but manages to catch it as his mother goes to the window.

## 141. MED. CLOSE SHOT

at window.

THE MOTHER  
(smiling)

Good morning.

BILL

Hi.

THE MOTHER

We missed you. Have you really been West?

BILL

(with an elaborate wink, and jerking his thumb toward the boy who is throwing the ball up)

Only west of Eighth Avenue. That was just a stall for the kid. I'm glad you're home. I wanted to see you.

He digs into his pocket and takes out a green-back, extending it through the window.

Continued [211]

141. CONTINUED

BILL

Here.

She hesitates, then takes the money.

142. CLOSE SHOT

of the Mother.

THE MOTHER

(slowly)

How can I go on taking money from you  
when I don't even know who you are?

143. CLOSE SHOT

Bill.

BILL

What difference does it make? I got no  
use for money. You need it. It's just a  
case of supply and demand.

144. TWO SHOT

favoring mother.

THE MOTHER

Why won't you tell me your name?

BILL

I never asked you yours, did I?

THE MOTHER

No.

BILL

I got no use for names.

THE MOTHER

Whoever you are, God bless you.

145. TWO SHOT  
favoring Bill.

BILL

If you pull any o' that I'll stay away from here.

(he pauses)

As a matter of fact, I'm goin' to stay away a while anyway.

(disgustedly)

Beginnin' to feel like a native around here. I'm blowing town.

Continued [212]

145. CONTINUED

THE MOTHER

(her face falls)

For good?

BILL

Good or bad, who knows?

THE MOTHER

Where are you going?

BILL

That depends on which freight I hop.

146. ANOTHER ANGLE  
on the two.

THE MOTHER

(hesitantly)

You don't like me to thank you, but I—I—

BILL  
(roughly)

Aw, forget it.

(he leans on the sill and continues earnestly)

Only, get this—I been slippin' you chicken feed. But I might get hot in a crap game some night an' clean up. An' when I do, I'll send you a heavy chunk o' dough some fine morning. Then you pack up and get outa here. Take that kid to the country. Maybe he can't hop freights, but anyway he can see 'em go by.

(He pauses)

That's better'n nothin', ain't it?

The twitching lips of the woman disconcert him.

BILL

So long!

He turns and exits out of the shot.

#### 147. CLOSEUP

of the mother, her eyes wet as she holds the money in her hand and looks after Bill.

[213]

#### 148. MED. FULL SHOT

of room. The kid is playing with the ball. He catches it, realizes that Stilts is no longer at the window and comes over to his mother.

THE KID

What became of Stilts, Ma?

THE MOTHER

He's gone.

She puts her arms around the frail shoulders of the kid, as

CUT TO:

149. EXT. STREET AND MUSIC PUBLISHER'S OFFICE—MEDIUM MOVING SHOT

with Bill, as he walks along the street followed by kids who swarm like bees at his feet. The sound of a piano and singing comes into the shot as Bill approaches a music publisher's office—one of the many on this street, which is Tin Pan Alley.

CUT:

150. CLOSE SHOT

Bill. He recognizes the singer's voice as that of Fay La Rue, and stops, looking around to see where the voice is coming from.

CUT TO:

151. INT. MUSIC PUBLISHER'S OFFICE  
MEDIUM SHOT

The office is on the second floor of a reconstructed brownstone building and has the name of the firm on the windows. Fay La Rue, smartly attired, is standing in a glass-partitioned section, concluding a song which she has been trying out. A gent is seated at the piano, a cigarette drooping from his lips as he pounds out the accompaniment.

Having finished, Fay wanders away from the piano and over to the open window of the office, CAMERA PANNING WITH HER. She lights a cigarette as she stands idly looking down at traffic on the street below.

CUT TO:

152. EXT. MUSIC PUBLISHER'S OFFICE—AT WINDOW—CLOSE SHOT

Fay at window. Back of her, in the small, glass-partitioned office, the gent at the piano is starting another number for three girls who begin singing a la Brock Sisters, while a hoofer tentatively goes through a routine of the same number. All of this will be used for background against which window shots will be played—the song continuing throughout the balance of the scene.

Fay, looking out through window, suddenly sees something which causes her face to light up.

153. MEDIUM SHOT—REVERSE ANGLE

Shooting out past Fay in window, as Bill comes into scene. He stops, as he recognizes Fay, then continues on his way again.

FAY  
(calling)

Hey, you!

154. MED. CLOSE SHOT

Bill, as he turns, hearing Fay's call.

FAY'S VOICE  
Big boy!

Bill comes over to the window, CAMERA PANNING WITH HIM.

155. TWO SHOT

shooting past Bill at window, toward Fay.

FAY  
(smiling)  
Got any more summonses for me?

BILL

(with an answering grin)

Not today.

FAY

D'you know, I called up the lawyers' office and left word I wanted to see the man who served those papers on me?

BILL

Yeah.

Continued [215]

## 155. CONTINUED

FAY

They sent somebody named Bragg. I asked him to get in touch with you. Did he?

BILL

Yeah.

FAY

Why didn't you look me up?

BILL

I was busy.

FAY

What doing? Stilt walking?

(she pauses, and looks over his get-up)

What's the idea of the ballyhoo rig?

156. CLOSE SHOT

toward Bill, as he leans his elbows on the sill of the window.

BILL

Well, y'see, lady, it's like this—there's a hardware store on Sixth Avenue sold a friend o' mine a stove last month on the installment plan. And today's the first o' the month. I get a dollar an hour for this particular brand of street walkin'. I need two bucks, so I put in two hours.

(pauses)

Now would you like to hear the story of my life?

157. CLOSE SHOT

toward Fay.

FAY

(amused)

Yes. I would.

(she continues slowly, with a look of bold appraisal)

And I got an idea you and I ought to have some sort of relations . . .

[216]

158. TWO SHOT

A quick, inquiring look from Bill, and she adds provocatively—

FAY

Business relations.

(she pauses)

What're you doing this afternoon?

**BILL**

Anything that appeals to me.

**FAY**

I'm in suite 1232 at the Towers.

She blows smoke from her cigarette, deliberately turns her back on him and walks into the inner office, joining the group at the piano. As Bill stares after her, puzzled,

**DISSOLVE TO:**

159. EXT. VAG. ENCAMPMENT—DAY

MOVING SHOT

with Bragg, as he walks along past several shacks. He comes to Bill's shack, pauses at the door, looks in and sees:

**CUT TO:**

160. INT. BILL'S SHACK

MEDIUM SHOT

Trina has her back turned to the door. She is busy rigging up a home-made set of scrimm curtains for the single wall aperture of the shack which serves as a window. She has no shades or rollers, so she is tacking the stuff up. She is completely engrossed in her work. Bragg enters shot as he comes up behind her.

**BRAGG**

Where's Bill?

Trina turns quickly.

## 161. CLOSE SHOT

Trina, as she sees who it is and the expression on her face reveals an instant repugnance. She goes right back to her tacking.

TRINA

Out somewhere.

(tack, tack)

BRAGG'S VOICE

Where?

Continued [217]

## 161. CONTINUED

TRINA

I don't know.

(tack tack)

## 162. TWO SHOT

BRAGG

(his glance at Trina's form frankly the unveiling sort)

If I had a cookie like you in my shack  
I'd be home all the time. The trouble with  
Bill, he don't appreciate you.

Trina's only reply is the tack tack of the hammer.  
He continues:

BRAGG

(sarcastic)

That's some man you got yourself, kid.

TRINA

(without turning)

Suits me.

BRAGG

Yeah. But d'you suit him? . . .

This brings her around, as he continues:

BRAGG

You wouldn't think so from the way he's always playin' you down—crabbin' how skinny you are.

TRINA

Well, I *am* skinny.

BRAGG

No, you're not.

(there is a note of caress in his voice)

Slim, but not skinny. I know what I'm talkin' about.

### 163. CLOSE SHOT

Bragg, as he continues:

BRAGG

I remember th' first night you came here—when you took a swim off th' barge. I watched you from the dock.

[218]

### 164. CLOSE SHOT

Trina, as she flares up.

TRINA

You better not let Bill find that out. He's got a temper, Bill has, and he's liable to break you in half—right smack in half.

165. TWO SHOT

BRAGG

Oh, no, he wouldn't. Bill's too busy.

TRINA

Busy with what?

BRAGG

All I know is there's a blonde in a show  
on Broadway that's been on his trail lately.

TRINA

Well, what about it?

BRAGG

You don't care if he steps out with other  
women?

TRINA

He can go out with forty women if he  
wants to—I got him.

(she adds hastily)

Not that I believe you. Bill's no cheat.  
If he wanted anybody else, he'd tell me first.

BRAGG

Well, if he ever does . . . you know  
where I'm at.

TRINA

You!

(with a disgusted grimace)

F-f-f! Even if I never knew Bill—even  
if you were the only one left in the world—  
you couldn't get near me—

(defiantly)

How d'ya like that?

## 166. CLOSE SHOT

Bragg.

BRAGG

Swell! It gives me somethin' to work  
for. Different men work different ways.  
Me, I got one principle. Take your time.

[219]

## 167. TWO SHOT

TRINA

I don't want to listen to you any more.

BRAGG

(looks at her with a loathesome yearning  
in his eyes)

You looked fetchin' all right, that night  
on the barge. I ain't been able to get you  
outa my mind since. Even in my sleep I  
keep dreamin' about it, over an' over.

(slowly)

You ain't skinny. You're just slim, an'  
white, an' curvy all over.

TRINA

(frightened, and stepping away from his  
gaze)

Get outa here, Bragg—and *stay* out.

BRAGG

Sure. There's no hurry . . .

He turns and exits.

168. CLOSE SHOT

Trina. She stands undecided a moment, trying to overcome the vague feeling of terror she has, then turns resolutely and resumes tacking up the curtains. CAMERA PANS SLIGHTLY to center on the crude window. Through the window we can see that it is starting to rain.

DISSOLVE TO:

169. INT. LIVING ROOM OF FAY'S HOTEL APT.  
—DAY—CLOSE SHOT

Featuring another window, hung with rich drapes. large drops of rain are splashing on the window. Fay's voice is heard:

FAY'S VOICE

So when you served that paper on me,  
you let me in for a suit for ten thousand  
smackers for alienation of affections.

As she talks CAMERA PANS from window to take in Fay, seated in a deep, easy chair, talking to Bill who is comfortably relaxed on one end of a divan opposite her. The room is part of a modernistic, candy box of a suite, costly and luxurious. Bill is now in his ordinary street clothes and Fay in a clinging, rather sheer afternoon dress. Between the chair and the divan is a taboret with liquor and glasses and the like, and it is obvious that both Fay and Bill have had several drinks. During the course of the scene perhaps Bill will have several drinks more.

## 169. CONTINUED

BILL

Well, what d'you want to go around alienating affections for?

FAY

The guy angeled my show. You can't raise backing without some kind of an I. O. U.

## 170. CLOSE SHOT

Bill.

BILL

What d'you want outa me—more backing?

## 171. CLOSE SHOT

Fay, from Bill's point of view. Her face is indistinct and hazy behind a cloud of cigarette smoke.

FAY

No. You're not the angel type.

BILL'S VOICE

Well, then, what's the party for?

FAY

(the smoke clears away as she leans forward)

To get acquainted.

172. MED. TWO SHOT

as Fay continues:

FAY

You showed up those three little Fauntleroys that were supposed to keep process servers away from me. I gave 'em the air.

(she relaxes back in her seat)

I'm in the market for a new bodyguard.

Bill's once-over of her is as deliberate as her own regard of him.

BILL

You don't need no bodyguard. You look like you can take care of yourself, all right.

FAY

I always have . . .

Continued [221]

172. CONTINUED

She rises, comes over to the divan and curls up on the opposite end.

173. CLOSER SHOT

of the two. She looks toward the window.

FAY

It's raining—there's no matinee today—and you don't have to be afraid of me. . . . Honest, I've got nothing up my sleeve.

BILL

Nothin' I haven't seen.

FAY

How old are you, honey?

## 169. CONTINUED

BILL

Well, what d'you want to go around alienating affections for?

FAY

The guy angeled my show. You can't raise backing without some kind of an I. O. U.

## 170. CLOSE SHOT

Bill.

BILL

What d'you want outa me—more backing?

## 171. CLOSE SHOT

Fay, from Bill's point of view. Her face is indistinct and hazy behind a cloud of cigarette smoke.

FAY

No. You're not the angel type.

BILL'S VOICE

Well, then, what's the party for?

FAY

(the smoke clears away as she leans forward)

To get acquainted.

172. MED. TWO SHOT

as Fay continues:

FAY

You showed up those three little Fauntleroys that were supposed to keep process servers away from me. I gave 'em the air.

(she relaxes back in her seat)

I'm in the market for a new bodyguard.

Bill's once-over of her is as deliberate as her own regard of him.

BILL

You don't need no bodyguard. You look like you can take care of yourself, all right.

FAY

I always have . . .

Continued [221]

172. CONTINUED

She rises, comes over to the divan and curls up on the opposite end.

173. CLOSER SHOT

of the two. She looks toward the window.

FAY

It's raining—there's no matinee today—and you don't have to be afraid of me. . . . Honest, I've got nothing up my sleeve.

BILL

Nothin' I haven't seen.

FAY

How old are you, honey?

BILL

Old enough to know better.  
She edges nearer to him on the divan.

FAY

Listen . . . I figure maybe I'm not going to be around when that suit against me comes up. I got a chance to go to London.

174. TWO SHOT

favoring Bill.

BILL

(disgustedly)

London! You might as well stay home. Italy—that's the place. Ever been to Italy?

FAY

No. Have you?

BILL

No, but I'm goin'—some day. There's a place—Italy! All they do over there is ride around in boats an' play guitars. I met a little Eyetalian tomato once—

(reminiscently)

Was she able! Ever since then I've had a yen to go to Italy. A man could sure do himself good over there.

[222]

175. TWO SHOT  
toward Fay.

FAY

(highly amused)

I suppose you know all about women.

BILL

I know one thing about 'em—all of 'em.

FAY

What?

BILL

They're all female.

FAY

Is that a compliment or a pan?

BILL

It's a fact.

FAY

Well, I'm one little girl that's always willing to face facts. Reach me a drink, honey.

He gives her a drink from the taboret. She drinks it; hands him the glass.

FAY

How long does it take you to get acquainted?

BILL

Me? I'm easy t'meet an' hard to forget.

She stares at him a moment, then bursts into laughter. She grows almost hysterical with merriment.

## 176. CLOSE SHOT

Bill.

BILL

(resentfully)

What's the joke?

177. MED. CLOSE SHOT  
toward Fay.

FAY

(still laughing)

Nothing.

Continued [223]

177. CONTINUED

She clammers off the divan and goes to the phone nearby, CAMERA PANNING WITH HER. She is still gurgling with laughter as she dials a number. The following phone conversation will be intercut with:

178. CLOSE SHOT

Bill, watching and listening.

CONTINUATION SCENE 177:

Fay, at phone.

FAY

(into phone)

Hello. Let me talk to Henry Meyers.

(pause)

Henry? . . . Fay. Listen, I got a great idea for a new number for the show. Get this title—'Easy to Meet and Hard to Forget.' Get it? . . . You're darn right it will. Sort of an 'Edie Was a Lady' number . . . Huh?

(she looks toward Bill)

Why, I—I just thought of it. Now call up Tiomkin and tell him to knock out a tune for it right away. Sounds like a natural.

(pause, and another look at Bill)

No, I'll be busy this afternoon . . . O.K.

(she hangs up)

179. MED. CLOSE SHOT

at divan, as she comes into scene to Bill.

FAY

You're all right. I like you better all the time. You grow on me.

She sits in his lap. Suddenly she reaches over and kisses him—a hot kiss, which at first he takes and then struggles away from as he did in the previous scene with Trina. Finally he separates his lips from hers and, holding her in his arms, looks at her wonderingly.

BILL

You women get some phoney ideas, all right . . .

DISSOLVE TO:

180. INT. BILL'S SHACK—NIGHT  
MEDIUM SHOT

Trina is ironing out some washing on the ironing board—a primitive affair, undoubtedly knocked together by Bill or perhaps by Trina herself. Nearby the table is neatly set for dinner, with plates and other utensils tidily arranged. There is a pot boiling on the stove. The room is lit by a swinging oil lamp.

Trina irons busily. Her face is unhappy and there is an aura of apprehension about her. She looks up at a battered old alarm clock set somewhere nearby.

INSERT: CLOSEUP ALARM CLOCK  
its hands pointing to nine o'clock.

BACK TO SCENE:

She resumes ironing, disconsolately, then starts suddenly as she hears footsteps outside on the dirt path. A fragmentary joy leaps into her eyes, which she conceals by bending again over the ironing board as Bill enters. He tries to cover up his hang-dog feeling with an exaggerated truculence.

TRINA

(in a small voice)

Hello, Bill.

Without answering, he takes off his hat and coat, flinging them into a corner of the room. She puts up the iron and goes to the stove.

TRINA

Your dinner got cold. I put it back on the stove to warm up.

BILL

I had dinner.

TRINA

Oh.

She resumes her ironing. He sits down on the edge of the cot.

181. CLOSE SHOT

Bill, watching Trina moodily.

182. TWO SHOT

TRINA

Kinda hot today, wasn't it?

Continued [225]

182. CONTINUED

BILL

(suddenly)

Why don't you say what's on your mind?  
Why don't you squawk 'cause I came home  
late for dinner?

TRINA

(quietly)

You got a right to come home late, Bill.

BILL

(with mounting irritation because Trina  
refuses to fight)

I guess I shoulda telephoned!

TRINA

(most reasonably)

How could you, without a phone in the house?

BILL

I suppose I oughta make up excuses for  
bein' late, huh?

She put up the iron and comes over to him. She gets down on her knees in front of him and looks up at him. She takes his hands.

183. CLOSE SHOT

of the two.

TRINA

You don't ever hafta make excuses to me for anything. You know you don't. You're your own master, Bill.

BILL

(savagely)

You're darn right, I am.

TRINA

O' course you are.

(she pauses)

Did you pay the installment on the stove?

BILL

Yeah.

(he takes a slip of paper out of his pocket and hands it to her)

There's the receipt.

183. CONTINUED

TRINA  
(smiles)

There. You see how easy it is? Only nine months more an' the stove is ours.

He doesn't answer and she looks at him anxiously.

TRINA

I bet you're tired.

184. WIDER ANGLE

as she rises and forces him down on the cot, picking up his feet and laying them on the cot.

TRINA

There, dear. Lie down.

He is stretched out on his back. She works the gadget that opens up the sky piece. Having done this, she goes back to her board and resumes ironing, humming a little tune as she works. He watches her, as

FADE OUT.

[227]

FADE IN

185. EXT. SECTION OFF RAILROAD TRACKS  
NEAR VAG CAMP—DAY—LONG SHOT

Of some kids playing baseball.

186. CLOSE SHOT

Of a kid at bat. The ball comes into scene from pitcher, the kid swings, hits a high fly and starts to run.

## 187. CLOSE SHOT

Of the pitcher, a red-headed kid of about twelve, as he stands in the pitcher's box looking up at the ball, following its course with the turning of his head.

## 188. FOLLOW SHOT

With ball as it comes down right into the hands of the shortstop—Bill. It's a cinch fly, but Bill lets it slip through his fingers. A chorus of disapproving yells greets this blatant error.

## 189. PAN SHOT

Of kids running around bases, taking advantage of Bill's error.

## 190. MED. CLOSE SHOT

Bill, as he recovers the ball and flings it to home plate, wild.

## 191. MED. CLOSE SHOT

Catcher. He leaps into the air and misses the ball.

## 192. PAN SHOT

Of kids runnin' around bases, cashing in on the second error.

## 193. CLOSE SHOT

Of Red, the pitcher. He flings his glove violently to the ground and CAMERA TRUCKS WITH HIM as he starts over to Bill.

194. MED. CLOSE SHOT

Bill stands sheepishly taking in the devastation caused by his double error, as Red comes up.

RED

(witheringly)

Yuh big butter-fingered palooka!

Other members of the team come into shot and group accusingly around Bill.

BILL

(apologetically)

Somethin' must've got in my eye, Red.

RED

Yeah—a freight car! Instead o' keepin' your mind on the game you was lookin' at them trains, like you always do!

BILL

Now listen, Red, I—

RED

(shrill with rage)

I warned you before! Somethin's come over you the last couple weeks. You been no good to us.

BILL

(meekly)

Don't I get another chance?

RED

No! Turn in your glove. You're thru.

With exaggerated misery, Bill takes off his glove and hands it to Red. Bill exits out of the shot as Red calls out:

RED

Hey, Slats!—

A wizened little kid runs up. Red throws Slats the glove and the kids go back to their places.

## 195. LONG SHOT

As the game resumes.

CUT TO:

[229]

## 196. EXT. IRA'S SHACK—MED. SHOT

A little space has been set aside outside the shack for a garden; a few anaemic flowers poke their heads thru the ground. Ira, wearing an eye shade and looking extremely rural in his shirtsleeves, is watering the flowers, flicking drops of water with his fingers from an old tin can. Bill comes into the scene, pauses, watches Ira a moment.

BILL

How're you doin', Ira?

IRA

Comin' along.

(he bends down to pluck weeds)

Dang weeds! Grow s'fast as you can  
pull 'em up.

## 197. CLOSE SHOT BILL

He shakes his head. . .

BILL

That's a dyin' lookin' layout, if ever I  
saw one.

198. MED. CLOSE SHOT

Of the two, taking in open doorway or window of shack, through which can be seen a shapeless form stretched out on Ira's bed—merely a suggestion of someone asleep there.

IRA

(straightening)

You gotta give 'em time to come up.  
There's no special hurry.

BILL

What kind of a dingus you call that one  
there—that tired lookin' one, I mean.

IRA

Huh? That one? That's a harebell.  
They're all harebell.

BILL

What'll you take for that little old sleepy  
one?

IRA

Nothin'! Don't wanna sell any.

Continued [230]

198. CONTINUED

The figure on Ira's bed b.g. raises up, apparently awakened by the voices outside. It is Flossie. She has been dozing, fully dressed, on Ira's bed. She looks blearily about as she comes out of her stupor.

BILL

Give-ya a dime for it.

IRA

'Druther keep it, if you don't mind, Bill—  
I'd just as soon wait till they come up a  
little stronger. Then you can have all you  
want.

Flossie, b.g., gets up and starts out of the shack.

#### 199. ANOTHER ANGLE

As Flossie comes out, blinking in the late afternoon sun. She looks owlishly at the two men, then without a word lurches away.

BILL

(with a grin)

If this sort o' thing keeps up, Ira, you'll have the neighbors talkin'.

IRA

Let 'em talk. The more time Flossie spends in my shack, the less time she has to get into trouble.

BILL

How about that dandelion wine you're always brewin'?

IRA

The more she drinks o' that, the less gin she'll drink.

BILL

You got weird ideas of reform.

(he pauses)

What's the use o' tryin' to make a pen-knife out'v a battle axe? Seems kinda foolish to me.

[231]

200. CLOSE SHOT

Ira, as he looks after the lurching figure of Flossie, b.g., then turns to Bill and quotes:

IRA

'God chose the foolish things of the world that He might put to shame those that are wise. And He chose the weak things of the world that He might put to shame those things that are strong.'

201. TWO SHOT

As Ira pauses and smiles.

IRA

That's in the Gideon Bible you got me, Son. Corinthians 1:26. Wait—I'll show it to you—

He enters the shack to look for the bible. The minute he does this, Bill bends quickly down and picks one of the harebells. He sticks it into his shirt pocket and quickly exits.

Ira comes out with the bible in his hand, looks for Bill, discovers he is gone, shrugs philosophically, adjusts his nose glasses and sits on the edge of the doorstep, opening the bible and reading, as we

CUT TO:

## 202. EXT. SECTION OF CAMP—TRUCKING SHOT

Of Bill, walking past several shacks of the camp. Bragg's voice, raised in florid oratory, comes into the scene.

## BRAGG'S VOICE

So they feed us patriotism an' salvation  
and a lotta other hooey. Bunk, that's what  
it is—bunk!

The trucking shot brings Bill up to where Bragg is giving his soap box speech. As he joins the group of eight or ten people fringed around the orator.

## 203. MED. SHOT

Of the group, with Bragg in the center on the soap box, holding forth in the best street-corner fashion. The group

Continued [232]

## 203. CONTINUED

of spectators include men, women and children, who are listening to Bragg not because they're interested in what he's saying but because it helps them kill time.

## BRAGG

(continuing his speech)

They feed us that stuff just to give us somethin' to be afraid of—to keep us from jumpin' out of the old harness. Anybody with brains knows that! It's the big guys with the dough keep feedin' that stuff out. Why? So we won't get outa control.

204. CLOSE SHOT

Bill, as Bragg's voice continues:

BRAGG'S VOICE

Why should certain guys have all the  
money there is an' you and me have nothin'?

BILL

Maybe they're smarter'n we are.

205. MED. CLOSE SHOT

Featuring Bragg.

BRAgg

Smarter! They just got the edge, that's  
all. They're on the inside, that's all.

(bitterly)

They tell you to go on out an' get a job.  
What job? There ain't no such animal.  
Look at me. I'm skilled labor. One o' the  
best toy packers in the business.

CAMERA SWINGS OVER TO BILL

BILL

(maliciously heckling)

What's a toy packer?

CAMERA SWINGS BACK TO BRAgg

Continued [233]

205. CONTINUED

BRAgg

Shippin'. Packin' toys to ship. I'm one  
o' the best men in the business. Used to  
work for Stark and Lee—where Ira works.  
Ask him. He'll tell'ya. Two years, an'

they let me out. Sure! What d'you expect? They're in with that Wall Street mob. They let me out without any notice—not a day.

## 206. CLOSE SHOT

Bill.

BILL

For gettin' drunk?

## 207. MED. SHOT

Bragg, shooting past group.

BRAGG

Me? Say, I never got drunk on the job in my life—only once or twice. But it wasn't for that. They claimed some stuff was missin'. Just the same old alibi to let me out an' save a couple dollars expenses. It's always been that way, the dirty capitalists!—

During the last of this speech, CAMERA PANS AWAY FROM the group, focusing on Bill's shack in the distance.

DISSOLVE THRU TO:

## 208. INT. BILL'S SHACK

MEDIUM SHOT

Flossie is seated watching Trina, who is busy as usual putting the finishing touches to Bill's supper. While she does this, Trina hums a song under her breath. Flossie watches her with a sullen expression on her face, then suddenly speaks up irritably:

FLOSSIE

Will you stop that singin'?

TRINA

(pauses)

Why?

Continued [234]

208. CONTINUED

FLOSSIE

What've you got to sing for?

TRINA

Can I help it if I feel good?

FLOSSIE

What about?

TRINA

Everything.

209. CLOSE SHOT

Flossie. She shakes her head.

FLOSSIE

Everything. That means Bill. You're stuck on him, ain't you?

210. TWO SHOT

TRINA

He's been good to me, Bill has.

FLOSSIE

Sure. He ain't sick o' you yet. You've only known him a few months. But wait. First thing that goes wrong—out! out! out! You're talkin' to somebody that's had dealings, kid—dealings.

TRINA

Maybe it won't be that way with me.

FLOSSIE

You don't know your men, kid—I can see that. You'll find out.

211. CLOSE SHOT

Trina.

TRINA

If Bill *does* get tired of me—then, if he does—I'll—

(she shakes her head)

But maybe he won't.

[235]

212. CLOSE SHOT

Flossie.

FLOSSIE

You're a cinch to get the air sooner or later. Why wait for it?

(pause)

Especially when there's so many chances for a woman to improve herself around.

213. TWO SHOT

Favoring Trina.

TRINA

How d'you mean?

FLOSSIE

You're young an' pretty. And you got a shape, ain't you? Well, what have you got it for?

TRINA

(shakes her head)

My shape's not so much, I don't guess.  
I'm kinda skinny, you know.

FLOSSIE

Who told you that?

TRINA

Bill.

#### 214. TWO SHOT

Favoring Flossie.

FLOSSIE

There's a man for you! Never expect  
a man to tell you anything nice about your-  
self. They're afraid you might get wise  
you're too good for 'em.

(looks Trina over with bleary eyes)

You got plenty o' shape. Nearly as good  
as mine when I was as young as you.

(she straightens up and runs a proud hand  
over her hips)

Not so worse now, what? Anyway, it  
still gets by, as they say. Well, it's up  
to you. All you got to do is say: 'Here  
I am—come an' get me, somebody.' That's  
the only way you can beat the game.

[236]

#### 215. CLOSEUP

Of Trina's pitying face, as she looks at Flossie.

## 216. CLOSE SHOT

Flossie. Her bravado deserts her and she breaks down and weeps. Trina comes into shot and comforts her silently. Flossie lifts a haggard face, moaning:

## FLOSSIE

I'm a liar—a broken down, played out, finished old bat. I used to be like you. Don't you ever get like me. I don't know why I said those things to you. Don't believe me. Don't believe a word I said!

As Trina pats her comfortingly:

CUT TO:

## 217. EXT. SECTION OF CAMP

## MEDIUM SHOT

Bragg, still on the soap box. The group listening to him has dwindled to Bill and three others—a couple of old women and a boy. Bragg is still engaged in his oration, undiscouraged by the dwindling audience.

## BRAGG

Accused of theft—an' me innocent! That's the way they work it. If I took the stuff I wouldn't care, but I didn't.

One of the women edges away, as Bragg continues:

## BRAGG

I never took a thing out o' the joint. Don't think I didn't have plenty of chances. And what a sucker I was not to have done it—a prime sucker!

218. REVERSE SHOT

shooting from behind Bragg. As he continues, the second woman drifts away, leaving only Bill and the small boy listening.

Bragg

Here I'm starvin' and they're still  
grindin' out profits exploitin' the workers,  
cashin' in on the sweat and blood of the  
toilers, the wage slaves!

Continued [237]

218. CONTINUED

The boy exists, leaving Bill the only one left to listen to Bragg.

BILL

You should never spiel around supper time, Bragg.

Bragg

(as he steps off the soap box)

That's it! If they had brains insteada bellies, they wouldn't be what they are. I'm sick o' them. I'm gonna blow this dump soon's I get some dough.

219. MED. CLOSE SHOT

Bill.

BILL

That'll be never.

BRAGG

(entering shot)

Is that so? Listen? I cut you in for fifty percent o' that summons money, didn't I? How'd you like to cut in on fifty percent of another job—a job where your cut'd be five grand instead o' five bucks?

BILL

What kind of a job?

BRAGG

That toy factory I was talkin' about. They fired me, didn't they? Why didn't they fire Ira? He's always asleep on the job. They took the bread right outa my mouth, didn't they? They owe me some-thin' and I'm gonna collect.

## 220. CLOSE SHOT

favoring Bragg, as he lowers his voice.

Continued [238]

## 220. CONTINUED

BRAGG

Get this, Bill. They got an old tin can they call a safe. I know the joint backwards. Every Friday they get ten grand for the payroll an' it stays in the safe till Saturday noon. It'd be a push-over, Bill, if you went in with me. Five grand apiece, Bill. What d'you say?

221. MEDIUM SHOT  
favoring Bill.

BILL

In the first place, what do I want with five grand? And, No. 2—if I needed money I'd go out an' make it. And, No. 3 —Trina tells me you been hangin' around the shack while I'm away and she don't like it. I told her I'd speak to you about it. There's only one language you can understand, Bragg—

He smacks Bragg in the face, knocking him cameraward.

BILL

That's it.

As he turns and exits.

DISSOLVE TO:

[239]

222. INT. BILL'S SHACK  
MEDIUM SHOT

Trina is at the stove, as Bill enters. He comes up to her, puts his arms around her, brings his fist down to poke her in the ribs a couple of times.

BILL

That hurt?

TRINA

(slips her arm up around his neck)

Not when you don't mean it.

BILL

Suppose I slugged you hard?

## 223. CLOSE SHOT

Trina and Bill.

TRINA

Bill—

BILL

What?

TRINA

D'you like bein' with me?

BILL

I ain't so nuts about it. You're pretty  
skinny. Leggo my head!

## 224. CLOSEUP

Flossie, watching.

TRINA'S VOICE

But you're not tired o' me yet, are you?

## 225. THREE SHOT

BILL

Hey! Leggo my head, I tell you, before  
I smack you one.He grabs her and gives her a terrific hug, almost  
forcing the breath out of her body.

Continued [240]

## 225. CONTINUED

TRINA

O-o-h! Gosh!

(to Flossie, proudly)

Bill's awful strong. Look—

(she points to a mark on her arm and raises  
her skirt a trifle to show another)

I'm black and blue all over where he just  
touches me. He don't know his own  
strength, Bill don't.

BILL

(gruffly)

Come on, Whoosits—dish up that stew!  
I'm starvin'.

She obeys promptly, setting the stew on the table  
and filling Bill's plate.

227. CLOSE SHOT

at table as Bill sits down to eat. When Trina's  
back is turned, he takes out the flower purloined  
from Ira's garden and puts it into the stew.

228. MED. CLOSE SHOT

Flossie, taking in open doorway through which  
Ira can be seen approaching.

IRA

(calling)

Supper's ready, Flossie.

FLOSSIE

I ain't hungry, Ira, thanks.

229. CLOSE SHOT

at table. Bill is seated with his back to the door.

TRINA

(watching Bill eat)

How's the stew, Bill?

BILL

It tastes funny. Didn't you put any salt in it?

TRINA

Yes—I think so. Wait—I'll get some more.

Continued [241]

229. CONTINUED

As she starts to do this, Bill pulls the flower out of the stew.

BILL

Hey!

TRINA

(startled)

What?

BILL

(holding up the flower)

What d'you call this? A fine thing to pull out'v a man's stew. What's the idea?

230. CLOSE SHOT

of Ira in doorway, looking over toward table.

231. MEDIUM SHOT

table, from angle of Ira and Flossie.

BILL

(tossing flower on Trina's plate)

What kind of a mess is this, anyway?  
Maybe I'll find most anything in it, huh?  
An old pair o' shoes, or somethin'.

Trina picks up the flower from the plate and looks at it.

TRINA

It's one of Ira's flowers.

(happily)

BILL! You got it for me.

BILL

(eating away rapidly to keep from smiling  
from ear to ear)

I found it in the stew, I tell you.

TRINA

What kind is it?

BILL

Huh? Don't you know that, even?  
Whew, but you're dumb! It's a—uh—a  
harelip—that's it.

[242]

232. CLOSE SHOT

Flossie.

FLOSSIE

*Harebell.*

233. CLOSE SHOT

at table.

TRINA

I don't care what it is, it's pretty.

BILL

That's a measly little one. Throw it  
away.

TRINA

No.

BILL

Throw it away, I tell you. I'll get you a bunch o' them. Big ones that look like somethin'. That kind ain't even got a smell.

He reaches over, grabs it and tosses it to one side. She promptly picks it up.

TRINA

I like it!

Ira has come up to the table, standing behind Bill. CAMERA PULLS BACK to take in Ira's frowning face, as Bill looks up. Bill takes a coin out of his pocket and hands it to Ira.

IRA

What's this for?

BILL

That's that dime I owe you. I bought a flower from you, didn't I? What's the matter with you? Can't you remember anything?

IRA

I didn't sell you no flower. Now, listen here, Bill—

#### 234. MED. CLOSE SHOT

Shooting past Ira toward table.

234. CONTINUED

TRINA

(intervening)

He got it for me. It's awful pretty, Ira. Maybe I'll plant some too, if Bill decides we'll stay here.

BILL

Don't worry about that.

IRA

Now, Bill, I can't have you pickin' 'em like that. Of course bein' as you got it for Trina . . . But I'll have to ask you not to do it no more.

BILL

(pushing Ira's hand with the dime away)

Go on an' take it.

235. REVERSE ANGLE

shooting past table toward Ira.

IRA

(stubbornly)

No, I ain't in the flower business.

(he throws the dime on the table)

God never meant for flowers to be sold. Susan said that, and Susan was close to God.

Bill stops eating long enough to take the dime.

BILL

(soberly)

She was, huh?

IRA

Yes. Susan walked hand in hand with God all her life. She was a good woman. She's with Him now, I s'pect.

BILL

She is, huh?

IRA

Yes, sir—if anybody's with Him, she is. Right there by His side. Right in the fold. She led a beautiful life—always a-singin' of His praises, a-baskin' in His glory.

Continued [244]

## 235. CONTINUED

BILL

That so? You're kinda close to God yourself, ain't you, Ira?

IRA

Not so close as I might be. And you could be closer, too.

## 236. THREE SHOT

at table; with Flossie b.g.

BILL

(derisively)

Who—me? Not me! Naw! I ain't lookin' for no protection. Nope, I don't belong messin' around God much. We'll leave that end of it to li'l old Whoosits here.

(he slips an arm around Trina)

She ain't so far away from God herself, are you, kid?

TRINA

I am, too! I ain't no nearer than you are. How could I be, when I'm with you?

BILL

(with a grin at Flossie)

How about you, Flossie?

FLOSSIE

(getting up)

When you can make wine outa dandelions, I'm willin' to believe anything!

(to Ira)

Come on, Ira—my tongue's hangin' out.

They exit. For a moment Bill and Trina sit at the table eating in silence; then the mournful, insistent wail of a train whistle comes into the shot.

### 237. CLOSE SHOT

at table. Bill suddenly pushes his plate away.

TRINA

(brightly)

Some more?

BILL

No. I'm not so hungry tonight.

Continued [245]

### 237. CONTINUED

CAMERA DRAWS BACK AND PANS WITH HIM as he gets up, wanders over to the bed, looks up and sees that the sky opening is shut. He turns.

BILL

What're you always keepin' that shut for?

## TRINA'S VOICE

I thought maybe it might rain or some-  
thin'.

## BILL

Suppose it does? Rain's good for you.  
(he opens the skylight, talking as he  
does so)

Makes you grow.

The open space in the shack ceiling reveals a darkening sky. Night is coming on. Somewhere in the distance the same accordion we heard in the opening sequence begins playing. It will be heard throughout the balance of the scene to the fade out.

Having opened the skylight, Bill lights a cigarette and stretches out on the bed, looking up through the space in the ceiling.

## 238. CLOSE SHOT

Of open skylight. A bird wings its way across the space.

## 239. CLOSE SHOT

Shooting down at Bill, as he lies on the bed. The winging bird causes a yearning look to come to his face.

## 240. CLOSE SHOT

Trina watching Bill as she eats. She looks up at the sklight.

## 241. CLOSEUP

Bill, looking up at the skylight. He shifts his head and looks at:

241. CONTINUED

INSERT: CLOSE SHOT

Of the new stove.

CONTINUATION SCENE 241:

The sight of the stove causes Bill to frown.

242. CLOSE UP

Trina. She notices this. Over this closeup comes again the sound of the train whistle. A spasm of fear contracts her face as she looks quickly at Bill.

243. MED. CLOSE SHOT

Bill. Part of the train whistle comes over this shot. The look of longing in his eyes is intensified. He stirs restlessly. He flicks his cigarette through the space in the ceiling, then puts his hands back of his head, using them for a pillow, and relaxes—looking at the patch of darkening sky.

244. CLOSE SHOT

Trina, watching Bill.

TRINA

(timidly)

Bill, why d'you always keep lookin'  
through that hole for?

245. MED. CLOSE SHOT

Bill. He doesn't answer.

TRINA'S VOICE

Why?

BILL

(without moving)

When you're dead, you get a hunk o' earth. When you're alive, you want to hold on to your hunk o' blue. That's all I got in the world. That's all anybody's got . . . a hunk o' blue.

[247]

**246. CLOSE SHOT**

Of the open skylight, as another bird wings by.

**247. MED. FULL SHOT**

Of the room. The train whistle is heard again. Trina rises abruptly and comes over to Bill. She kneels down alongside the bed, reaches for a blanket and covers him.

**248. CLOSE SHOT**

Of the two. She runs her fingers through his hair.

TRINA

(in a low voice)

Bill—

He grunts. His thoughts are with the winging bird. She continues slowly:

TRINA

What Ira said . . . I been thinkin'—there couldn't be any heaven much better'n this, could there? I mean when it's quiet all around and we're close—like now.

He turns and looks into her eyes. He reaches forward with a finger and pulls her lids down, squinting as though for a closer examination of her eyes.

BILL

I never noticed it, kid, but your eyes are sky color, sorta.

(he pinches her cheek, pushing her head away a little)

You got a hunk o' blue in each glim.  
(immediately ashamed of his sentimentality,  
he adds quickly)

But that don't stop me from cloutin' you  
on the chin any minute.

She smiles and throws her head way back so that her pointed little chin offers a target. Leaning on one elbow he brings his fist into roughly playful contact with her chin. She covers his fist with her hands in a caressing gesture. He looks at her a moment in silence.

BILL

Climb in here.

[248]

249. MED. CLOSE SHOT

She gets into bed with him, cuddling up to him.

BILL

(looks at her)

You're all right—a swell kid—I like you plenty.

TRINA

(happy to bursting)

Do you, Bill?

BILL

Yeah. But don't get figurin' on that too much.

The smile fades from her lips. He continues:

BILL

Because how much I like a woman ain't nothin' to bet money on. I'm liable to be steamed up about you today and washed up tomorrow. You know, I been tangled up with women before.

TRINA

Yes, I guess you must've known lots of 'em. And nicer ones, too, I guess. Bigger and fatter.

BILL

Fatter, sure—but no nicer. You're not so bad. A little more meat on you an' you'd be lotsa woman. You suit me fine—right now.

TRINA

(mollified)

Do I?

BILL

But maybe you won't tomorrow, see? And you kinda got to watch yourself on that account. Don't let yourself get in too deep, see?

250. CLOSEUP TRINA

TRINA

Yes. But—but what if—sometimes you do and—and you can't help it. What then?

[249]

251. CLOSE SHOT BILL

BILL

That's the way she goes. You just hafta learn how to take it an' laugh it off.

252. TWO SHOT

favoring Trina.

TRINA

(alarmed)

You mean, Bill, I—I—you're goin' to—

BILL

What?

TRINA

You said I'd hafta—take it—

BILL

Naw, not you. I mean anybody—anybody that gets it.

TRINA

(relieved)

Oh.

253. TWO SHOT  
favoring Bill.

BILL

No, I don't mean you, yet. But I'm apt to hand it to you any day. Who can tell? Suppose I wake up some mornin' with a taste in my gnouth like wet hen feathers? Woman don't look so good them mornings, an' I'm just as apt to push you in the face an' take a stroll for myself as not.

TRINA

But maybe that won't be right away—I mean, not tomorrow or—quite so soon.

BILL

Can't tell. Nobody knows how a guy's apt to feel some morning. He just wakes up like I said and—there he goes.

Continued [250]

## 253. CONTINUED

TRINA

But all men don't do that.

BILL

No . . . but them that don't, feel like it. Or maybe they can't get away.

TRINA

Why can't they?

BILL

A man can have a lotta reasons.

She is silent. Together they listen to the accordian in the distance.

254. CLOSEUP TRINA

TRINA

Bill, listen--you like babies, don't you?

255. CLOSE TWO SHOT

Toward Bill, as he sits up abruptly.

BILL

What's the difference if I like 'em or not?

TRINA

Well, it'd make a difference—a big difference—if you didn't.

BILL

Why?

256. CLOSE SHOT TRINA

TRINA

Because you're gonna have one.

(she adds in a rush of speech)

I've known it a long time—several months. I thought I'd be afraid to tell you—but ever since we been here I ain't afraid o' nothin'.

[251]

257. TWO SHOT

favoring Bill.

He is about to speak but she quickly puts her hand over his mouth and continues:

TRINA

Don't say nothin', Bill, till I finish . . .  
I want you to know somethin'. It's your baby and mine—but you got nothin' to

worry about. I'm willin' to take all the blame for it.

His face is a mask of woe. She senses his mood and a note of despair creeps into her voice as she continues:

TRINA

I didn't mean to tell ya at all. But pretty soon you'd know anyway, and it's just too—too grand and wonderful to keep to myself. You can't understand it, Bill—you're a man. But look—

Again he is about to say something and she covers his mouth with her hand.

TRINA

Please let me finish—

258. CLOSE TWO SHOT  
toward Trina.

As she continues:

TRINA

You needn't look at me like that. I'm not afraid of you, darling. I've changed a lot. Only a little while ago I was all alone. Then you came along an' there was two of us. Now there's three of us.

(hysterically)

You kin never leave me now, Bill—never!—Never! Even if you go away—I've got you now. No matter where you go—no matter what you do—I've got you—I've got you! You're a prisoner inside of me.

BILL  
(dazed)

Wait a minute.

259. MED. SHOT

As Bill gets off the bed, goes for his hat and coat and exits without another word or a backward glance.

FADE OUT.

[252]

FADE IN:

260. INT. THEATRE WINGS AND STAGE—  
NIGHT—CLOSE SHOT

Bill. Over the shot comes the words of the song: "Easy to Meet and Hard to Forget," as sung by Fay La Rue.

CAMERA DRAWS BACK to show Bill lounging in the wings. B.g. can be seen chorus girls, comics, stage hands, etc.

CAMERA PANS OVER to center of stage for a shot of Fay as she sings. The rendition of her number will intercut with:

261. CLOSEUP

Of Bill, listening and reacting.

262. OMITTED

263. MED. SHOT

As Fay finishes the song and, to the applause of the audience, runs off, almost plumb into the arms of Bill, CAMERA PANNING WITH HER.

## 264. CLOSE SHOT

Fay and Bill, as she looks up at him. A troupe of chorusters move past them for the next number. We hear the music of the next number over the scene as Fay greets Bill.

FAY

(her face lighting with delight)

Hello, Hard-to-Forget.

BILL

I got to see you a minute.

FAY

(grabs his arm)

Come on up. I've got to change for the next number.

## 265. TRUCKING SHOT

With them as Fay leads him along past actors and stage hands and they mount the circular staircase leading to the dressing rooms above—Fay keeping up a constant stream of chatter . . .

Continued [253]

## 265. CONTINUED

FAY

Another week and I'm through. I got great news for you, Bill. I'm going to have a month off before I open in London. That'll give us a few weeks to fool around —France and Italy—or maybe just Italy . . .

By this time they reach the top of the stairs.

266. PANNING SHOT

With them as Fay leads Bill past more lolling and moving figures of the musical show, up to her dressing room door . . .

FAY

We'll ride around in one o' those gondolas, and you'll play the guitar . . .

As they enter Fay's dressing room,

CUT TO:

267. INT. FAY'S DRESSING ROOM—

MED SHOT

As Fay enters with Bill. A negro maid is waiting in the dressing room with Fay's costume for the next number all laid out and ready. The following scene will be played with the maid dressing Fay—a complete change of costume. The fact that Bill is in the room makes no difference to either Fay or the maid and we get the feeling that he has been there before at similar times. Throughout this scene music of the number in progress on the stage will be heard.

FAY

(as the maid starts to dress her)  
How does that sound to you, baby?

BILL

(directly)

Great. But I can't go with you.

## 268. CLOSE SHOT

Fay, as she looks up quickly.

BILL

Kidding?

[254]

## 269. THREE SHOT

Favoring Fay, as she dresses.

BILL

I told you my trademark, didn't I?  
'Subject to change without notice.'

FAY

I know. But I've arranged everything—  
even passage on the boat for you.

BILL

I'm sorry, but I can't go with you

FAY

What's happened?

BILL

I let myself in for something—on the  
installment plan.

FAY

What is it? Tell mama.

BILL

I'm in a jam.

FAY

What kind of a jam?

BILL

It's personal.

FAY  
(coaxingly)

Tell me.

BILL

No. It's just between me and another party and it's not important—only it means I gotta hang around for a while.

FAY

Business is good. I might be able to get 'em to keep the show here another week or two . . .

(pauses)

Or else you could take the next boat.

[255]

## 270. ANOTHER ANGLE

Favoring Bill.

BILL

No. Rub me out. I'm gonna go on a diet—no women. They interfere with my circulation. That goes for all of 'em.

FAY

Just the same, I know what it is.

(accusingly)

It's a girl.

BILL

You're a fortune teller.

FAY

It is.

(pause)

Isn't it?

BILL

Search me. I won't know myself for a few months.

## 271. REVERSE SHOT

Featuring Fay.

FAY

Oh.

BILL

An' I won't be around then, to find out.

FAY

(slowly)

I see. You got a bicycle.

BILL

A motorcycle.

FAY

Well, I got a Rolls. I'm broadminded.

## 272. MED. SHOT

There is a knock on the door and the call boy's voice is heard calling Fay's name. She is dressed now. She comes over to Bill and puts her arms around him.

Continued [256]

## 272. CONTINUED

FAY

That jam you're in can be fixed. There's always ways and means. If it's money you need, I got plenty. There's hardly anything money won't fix. You can bank with me for all you need.

(coaxingly)

Hard-to-Forget, you want to go travelin'—you know you do. And I got itchy feet myself. We'll make Europe with a hop, skip an' a jump. Night stands and sleeper jumps all over the map, honey.

The knocking on the door is repeated and again the boy calls out:

CALL BOY'S VOICE

Miss La Rue!

FAY

(to Bill, as she starts toward the door)

I'll be right back—I want to talk to you—don't go away—

As she opens the door to exit, the maid picks up a gaudy cloak and follows Fay out of the dressing room.

Bill stands undecided a moment, lighting a cigarette, deep in thought. It is characteristic that he borrows the cigarette from a case on Fay's dressing table. He looks around, undecidedly, and spots some sheet music. He goes over and picks up one of the songs.

### 273. CLOSER SHOT

It is a published copy of Tosti's "Goodbye Forever." Acting with sudden decision Bill rips off the top part of the song sheet containing the word "Goodbye" in very large type. PAN as he goes over to the dressing table, sticks the bottom part of the torn paper into an open pot of grease paint and stands the paper in the most conspicuous place he can find on the dressing table.

## 274. MED. SHOT

As he exits from the dressing room.

DISSOLVE TO:

[257]

275. EXT. PADDY'S MARKET—NIGHT—  
FULL SHOT

This is the open air market situated under the elevated with hundreds of pushcarts congregated, doing a land office business with the poor people of the neighborhood. Every nation under the sun is represented at this market, among the vendors as well as the customers. There is a babble of voices and the flare of acetylene torches attached to the various pushcarts. Every conceivable kind of merchandise and edibles are for sale in this market, and haggling is continuous. Over and above the human voices comes the intermittent roar of the elevated as it thunders above the pushcarts.

CUT TO:

## 276. EXT. SECTION OF MARKET—MED. SHOT

Featuring an Italian vendor with a pushcart loaded with vegetables. Trina is standing in front of the pushcart among several other women, some with children. She has a large basket crooked in her elbow and presents a startling contrast to her usual mousey self in her lion-like attitude toward the vendor. It is apparent that she has been quarreling with him.

TRINA

(angrily, as she digs into the pile of corn on the cob at the end of the pushcart)

Why don't you pull some of the good ones outa the bottom?

(she gets a nice long one)

Like this! You think I was born yesterday? I want the best—the very best.

VENDOR

(protestingly)

The best, she cost twenty cents a dozen.

TRINA

Not to a regular customer, Pietro. Here—I'll pick 'em myself.

She sets the basket down and digs into the corn cobs, discarding certain anaemic and partly eaten away cobs, digging down for the fat and succulent ones until presently her arms are filled with a dozen ears of corn. She bends down and throws them into the market basket which is already heavily loaded with other edibles, canned stuff, onions, cabbages and the like. She straightens up, hands Pietro a couple of coins, picks up the basket and turns to go.

## 276. CONTINUED

CAMERA PANS WITH HER as she struggles along, tugging at the heavy basket. She bumps right into Bill. She looks at him a moment in surprised silence.

BILL

I was just over to the shack. Flossie told me you were here.

## 277. CLOSE SHOT TRINA AND BILL

With the violent gesticulations and clamor of bargaining at booths b.g. and a constant stream of buyers back and forth as they stand there.

TRINA

I had to do my shoppin' for tomorrow's supper.

BILL

(surly and unsmiling)

Whose supper?

TRINA

Yours.

BILL

How do you know I'll be around tomorrow?

TRINA

In case you are.

BILL

Suppose I don't show up.

(she looks at him without answering and he adds)

Tomorrow—or ever.

TRINA

I suppose I'd be lonely again, like I was before I met you. But it wouldn't be the same, exactly . . . I got somethin' to look forward to, now.

278. TWO SHOT

Toward Bill.

BILL

(grimly)

I'll say you have.

Continued [259]

278. CONTINUED

TRINA

I'll never be lonely when my son comes.

BILL

How d'you know it'll be a son?

TRINA

I prayed for a son.

BILL

I thought you didn't believe in that sort o' stuff.

TRINA

Sure, I do.

BILL

You told me you didn't.

TRINA

(simply)

I lied. I didn't want you to get sore at me. But I guess you're angry now, aren't you?

BILL

Why should I be? It's your funeral.

## 279. TWO SHOT

Toward Trina.

TRINA

(brightly)

Yes, it's my funeral. I'm gonna stand on my own feet, now, I'm gonna bring my son into the world and I'm gonna take care of him and love him, always.

BILL

(a little bitterly)

And as far's I'm concerned—

TRINA

(quickly)

You too—always.

(she nods)

That goes without saying.

(wistfully)

But you're a free man, Bill. As free as a bird. Remember that.

279. CONTINUED

BILL

I'll remember.

(abruptly)

Come on home. Ira's waitin'.

TRINA

(puzzled)

Ira?

BILL

Yeah. Him an' his Gideon. Sure. If it's my son, the least I can do is give him a name.

280. CLOSEUP TRINA

She stares at him wonderingly.

281. TWO SHOT

As Bill speaks roughly:

BILL

Gimme that basket. I'll carry it.

He takes the basket from her hands and slips it over his elbow. She takes his arm. PAN as together they walk in silence between two rows of sweating pushcart vendors, each pushcart surrounded by haggling women. As they walk through the line of pushcarts,

DISSOLVE TO:

282. INT. BILL'S SHACK—NIGHT—MED. SHOT

The flickering shadows of Bill, Trina, and Ira are seen, thrown on the wall of the shack by the light from the kerosene lamp. Ira is performing the marriage ceremony, reading from the Gideon Bible which he holds in his hands.

## IRA'S VOICE

—through the same Jesus Christ, our Lord,  
Who liveth and reigneth within, and the  
Holy Spirit, ever one God, world without  
end . . . Amen.

He can be seen to lean over and join the hands  
of Bill and Trina.

[261]

## 283. CLOSE SHOT

The hands of Bill and Trina, as Ira's hand  
finishes joining them together.

CAMERA DRAWS BACK to take in the faces  
of the two as Trina looks up at Bill, who stares  
frozenly ahead of him. The words which have  
thrilled and filled Trina with a strange and almost  
hurtful happiness have rung in Bill's ears like a sen-  
tence of doom. Trina has changed her dress for an  
old, but very lovely old-fashioned gown of the  
period of the 90's. She looks like something out  
of an old album as she stands beside Bill.

## 284. CLOSE SHOT IRA

In his shirt sleeves and wearing a gun in a  
shoulder holster—as he continues solemnly:

## IRA

Those whom God hath joined together,  
let no man put asunder.

## 285. GROUP SHOT

Taking in Flossie, who stands a little to one side  
as witness. Bill removes his hand from Trina's.  
Ira clears his throat.

IRA

That's it, I think.

FLOSSIE

It would've looked better, Ira, if you wasn't packin' that heater.

IRA

(apologetically puts his hand on the gun and glances at it a moment)

I'm sorry. I was on my way to work when Bill came and asked me to—er—perform the ceremony. And I've got to go now—I'm late.

(to Bill and Trina)

O'course, ain't a church, but the words are the same, no matter who reads 'em. And, in the eyes of God, you're man and wife.

There is something sad and forlorn in his eyes as he looks at them and repeats:

IRA

Man and wife.

[262]

## 286. CLOSE SHOT

Featuring Trina and Ira.

TRINA

Thanks a lot for the dress, Ira. I'll let you have it back in the morning.

IRA

No, Trina. Keep it.

(wistfully)

You look just like Susan looked when she wore that dress forty years ago. It's laid in my trunk a long time. I s'pect it's too old-fashioned to be much use now—but it sorta suits you, Trina. You can call it a weddin' present.

(abruptly)

Well, I guess I got to go to work.

He shambles out.

## 287. THREE SHOT

FLOSSIE

(dully)

Believe it or not, I stood up like that once, and I heard the same words—and I believed 'em, too—

(quotes)

'Whom God hath joined'—

BILL

(interrupts harshly)

Handcuffed, you mean.

He exits. Trina stands quietly looking after Bill. She makes no effort to follow.

## 288. MED. CLOSE SHOT TRINA

Flossie comes into the shot. She sees that despite the twisted little smile on Trina's face, her eyes are wet with unshed tears. Flossie fidgets uncomfortably a moment, opens her mouth to say something, changes her mind and looks over at the table. On a tray on the table are a jug and four little glasses.

FLOSSIE

Can you beat it? Ira forgot to hand out the dandelion wine!

Continued [263]

288. CONTINUED

She goes to the jug, pulls the cork and fills two of the glasses with the wine. She picks up the glasses, handing one to Trina.

FLOSSIE

Well—

(she hesitates, and speaks hopelessly)

Here's hopin'.

She tilts back her head and slugs down the wine. Trina stands with the wine glass in her hand, the wine untasted, as we

CUT TO:

289. INT. BRAGG'S SHACK—MED. SHOT

In his underwear and overshirt Bragg is asleep, a patch of moonlight lighting up his filthy, bloated face. Bill enters, comes up to the cot and looks down on Bragg with an expression of distaste on his face. He bends down and shakes Bragg, who wakes and stares up owlishly, blinking.

BILL

Get up, Bragg!

Bragg swings over and sits on the edge of the cot. He looks up at Bill suspiciously, a little fearfully.

BRAGG

What is it?

BILL

I wanna scram outa here right away—tonight. Only it so happens I can't go unless I leave some money behind. Enough to take care of somebody—a couple people for a long time. I gotta have plenty o' money—see?

BRAGG

(whining)

I haven't got a dime, Bill—not a dime.

BILL

No—but you know where to get it.

290. CLOSE SHOT

Favoring Bragg. He is puzzled; then the light of comprehension in his eyes.

Continued [264]

290. CONTINUED

BRAGG

Oh . . .

As he stares up at Bill:

CUT TO:

291. INT. IRA'S SHACK—MED. SHOT

Ira completes the making of his bed, puts on his hat and coat, picks up his Gideon Bible, turns out the lamp and, as he exits:

CUT BACK TO:

292. INT. BRAGG'S SHACK—MED. CLOSE SHOT

Bill is seated on the cot alongside of Bragg, who is wide awake now, talking to Bill eagerly in a hoarse whisper.

BRAGG

Ira? That's the easiest part of it. All the guy does down there is snooze. We could walk away with the buildin' an' he wouldn't know it. All we need's a coupla drills an' some gunpowder—and boom!

He makes an expressive gesture with his hands.

BILL

Get into your clothes.

293. WIDER ANGLE

As Bragg rises and goes over to a soap box, on which his clothes are thrown. As he begins to dress,

DISSOLVE TO:

294. INT. SMALL OFFICE OF TOY FACTORY—  
NIGHT—CLOSE SHOT

Featuring Ira's Gideon Bible on a desk. It is closed, with Ira's gun between the pages as a marker. CAMERA, DRAWING BACK, reveals Ira asleep by the desk. On the desk alongside the Bible is a flashlight. The lighting in the room comes from a single electric light bulb which is turned on and shaded off so that the light just misses Ira's head and is concentrated on the desk. Ira snores gently.

Continued [265]

294. CONTINUED

CAMERA SLOWLY PANS from desk, passing a door upon which we see lettered the firm name of the toy factory, Stark & Lee, and over to a half wood, half glass partition to the left of the door.

Through the glass section of the partition we see the faces of Bragg and Bill looking in at the sleeping Ira. Bragg has a newspaper-wrapped bundle in one arm. He can be seen to nudge Bill and whisper something to him. In pantomime we get over the fact that Bragg is suggesting to Bill that they do something about the sleeping watchman. With his hand he makes the motion of blackjacking Bill shakes his head and shows a violent objection to this procedure. He makes some sort of counter suggestion which we do not hear and Bragg shrugs. As they turn away from the glass partition,

CUT TO:

295. INT. CORRIDOR OF TOY FACTORY—  
MED. CLOSE SHOT

Bill and Bragg, as Bragg quietly turns the key in the lock of the door of the small office, and he and Bill start stealing down the corridor.

CUT TO:

296. INT. A LARGE OFFICE OF THE TOY  
FACTORY—FULL SHOT

The room has several windows through which shafts of light come in from some course in the street, probably street arc lights. This office is more elaborately furnished and more imposing than the smaller office but should not suggest anything very modern or up-to-date. We want to get over the feeling of the sort of an office that might exist in a rather old-fashioned factory building down town. In one corner of the office is a large, old-fashioned safe with the name of the firm upon it.

In the center of the room, on the other side of the desk, is a long table of the sort used to display samples, and upon this table are a score or more of sample toys of the mechanical type which are wound up for movement.

We see a door at the far end of the office open and Bragg and Bill come in.

297. MED. CLOSE SHOT

Bragg and Bill—PANNING WITH THEM past the sample table to the safe. The two men look at the safe in silence.

Continued [266]

297. CONTINUED

BRAGG

(in a husky whisper; gloating as they examine the safe)

What'd I tell you? Could open it with a nail file.

He gets down on his hands and knees and starts working, as Bill looks curiously about the office.

298. CLOSE SHOT

Bragg. He first takes a squat, stumpy candle from his pocket and lights it. By the dim illumination of the candle he opens the newspaper-wrapped package and we see revealed the necessary tools and equipment for the blowing of the safe. As he does this, CAMERA GUNS UP TOWARD BILL who, attracted by something in the office, walks out of the shot. CAMERA centers on Bragg again as he works in silence for a moment, sorting out the necessary implements. Then, hearing a slight noise,

he turns, looking for Bill. He spots him off scene and registers alarmed irritation.

BRAGG

(in a low tone)

Hey! What're you doin' there?

As he stares off scene:

**299. MED. CLOSE SHOT**

At a sample table. This scene is lit from street lighting outside or possibly from moonlight. Bill has been prowling among the various toys and has found one that particularly appeals to him. It is an absurd little tin soldier, rigidly holding a bugle to his lips and operated by a spring that not only enables the little tin soldier to goose-step but also causes his cheeks to puff out and an elfin, tinny imitation of real bugle music to issue from the bugle. (The tune the bugle plays is Reveille.)

BILL

Look at this gadget.

**300. CLOSE SHOT**

Bragg, holding up the candle to see.

Continued [267]

**300. CONTINUED**

BRAGG

What is it?

**CONTINUATION SCENE 299**

BILL

Ain't it a hot one? Wait till I wind it up and see what it does.

He starts to wind it.

CONTINUATION SCENE 300

BRAGG

(hoarsely)

Say, what're we here for—to kick in this  
pete or play with toys? Come on!

CONTINUATION SCENE 299

BILL

Just a second. I wanna see how it  
works—

PAN DOWN WITH HIM as, having wound  
the toy up, he places it on the floor.

301. CLOSE SHOT

At floor, as the toy stars to walk and play  
“Reveille.”

302. INT. SMALL OFFICE OF TOY FACTORY—  
CLOSE SHOT

Of Ira, fast asleep. The sound of the toy bugle  
comes faintly into the shot. Ira stirs, wakes and  
listens.

CUT BACK TO:

303. INT. LARGE OFFICE OF FACTORY—  
MED. SHOT

Alarmed, Bragg reaches out and grabs the toy  
soldier.

BILL

Gimme that!

## 303. CONTINUED

He takes the toy from Bragg.

Bragg

What's the matter with you? You wanna  
wake up the old geezer?

BILL

If this wakes him up, what's goin' to  
happen when you blow that safe?

Bragg

He's locked in his office, ain't he? By  
the time he gets here, we'll be gone. Put  
that thing back and gimme a hand.

## 304. CLOSE SHOT

Bragg, as he selects a drill and places the drill  
point over the tumblers of the safe.

Bragg

(as he drills)

If he wakes up we'd be in a tough spot—  
without a gun or anything . . .

(pauses and looks up)

I still think you oughta go back an' tap  
him on the head, like I told you. I'd feel  
a lot better if he was gagged and tied up.

## 305. TWO SHOT

BILL

Nah. Ira wouldn't hurt a fly.

BRAGG

(uneasily)

Well, just the same, you better go over  
an' open that window, there.

BILL

What for? We're up three stories.

BRAGG

There's a fire escape.

PAN WITH BILL over to the window. He  
opens it and looks out.

306. CLOSE SHOT

Bill at window.

Continued [269]

306. CONTINUED

BILL

Sure is a swell night out. Look—you  
can see the old river from here.

(he points)

An' the camp, too.

(he is silent a moment, the sound of the  
drill coming into the shot)

The moon sure looks slick on that water.  
I think when I blow outa here I'll hit the  
waves instead o' the ties . . . Maybe on a  
freighter . . . Did'ya ever go downtown  
an' get the smell o' them ships that come  
in from China and them places? . . .

(he winds the toy in his hand, looking at it)

I wonder what Whoosits is doin'? I'm gonna take this dingus home to her . . . She can give it to the kid. She'll get by all right, now, with the dough I'm gonna give her . . .

He is interrupted by the sound of Bragg's voice, panicky—

#### BRAGG'S VOICE

Look out!—

#### 307. TWO SHOT

As Bill wheels around, looking in the direction in which Bragg is pointing.

CAMERA SWINGS OVER to take in the slightly open door at the opposite end of the room, as the beam of a flashlight sweeps across it.

#### 308. MED. SHOT

Bragg makes a dive for the window, scrambles through it and is gone. Bill turns with a quick look toward the safe.

#### 309. CLOSE SHOT

At door, as the figure of Ira appears, flashlight in one hand and gun in the other.

#### 310. FULL SHOT

Of room. Bill's back is momentarily toward the door as he looks at the safe. The next instant, as he turns to follow Bragg out the window, Ira fires. Bill staggers and goes down.

311. MED. SHOT

Taking in Bill and safe, as Ira comes into the scene, gun in hand. Bill suddenly comes to life and, grabbing Ira by the foot in a tackle, throws him down. There is a struggle, during which Bill, with small difficulty, grabs the gun from Ira's hands. All through this, Ira has not recognized Bill, and it is only as Bill has wrenched the gun from his hands that Ira gets a full look at Bill's face.

312. CLOSE SHOT

Of the two, Bill holding Ira's gun pointed directly at Ira.

313. CLOSEUP

Ira, as he recognizes Bill and stares at him, unbelieving, hardly able to credit the evidence of his senses.

314. EXT. FIRE ESCAPE—CLOSE SHOT

Bragg. He crouches on the fire escape, peering over the sill of the window into the office, watching.

CUT BACK TO:

315. INT. LARGE ROOM OF TOY FACTORY—  
TWO SHOT

Bill and Ira.

BILL

Yes, it's me. Me! The guy you married off a couple of hours ago. I'm not here on my honeymoon, either . . .

(he puts his hand to his wounded shoulder  
and withdraws it, covered with blood)

For a guy that reads Bibles an' raises  
harebells you shoot pretty straight, don't  
you?

(winces)

You old son-of-a-gun! You might've  
killed me.

IRA

Served you right if I did. Somebody  
ought to teach you a lesson.

(stuttering with rage)

A young squirt like you goin' around  
robbin' places!

Continued [271]

### 315. CONTINUED

BILL

It's a low-down thing to do at that, ain't  
it? But if you had to have money as bad  
as I do, you wouldn't be so particular.

IRA

Who was that man with you?—the one  
that got away?

CUT TO:

### 316. EXT. FIRE ESCAPE—CLOSE SHOT

Bragg, crouching and listening.

BILL'S VOICE

Him? I don't remember the name. I  
never met the guy before tonight.

CUT BACK TO:

317. INT. LARGE ROOM OF TOY FACTORY—  
TWO SHOT

Bill and Ira.

IRA

You better give me that gun and surrender peacefully. If you do, I'll see the law deals easy with you.

BILL

(contemptuously)

They ain't gonna deal with me at all.

CAMERA PULLS BACK as he gets to his feet.

BILL

Stay where you are, Ira. Don't move. If you start anything I'll bust you one you'll remember the rest o' your life.

Ira watches as Bill goes over to the safe.

IRA

What'd you expect to find there—if you did get it open?

BILL

(disgusted)

Apples.

Continued [272]

317. CONTINUED

IRA

Lemons, more likely. You certainly wouldn't've found any money—not in that old cracker-box. If it's the payroll you're after, it's in a safe in the other office.

BILL

(turns quickly)

That so? Know the combination?

318. MED. CLOSE SHOT

Ira.

IRA

If I did, I wouldn't tell you.

Bill enters shot, threateningly.

BILL

Maybe you would if I poke this gun down your gullet.

IRA

Try it. If you got guts enough to shoot a man in cold blood, then I got guts enough to take it.

BILL

(relaxes)

I guess you have, at that.

(he grins)

You're all right. I wouldn't hurt you. If I knocked you off, who'd take care o' them harebells?

CUT TO:

319. EXT. SECTION OF FIRE ESCAPE AT GROUND FLOOR—MED. SHOT

Bragg, looking around to see whether anyone is on the street below, watching, satisfied himself that he is unobserved and tries a window on the first floor. It opens. As he climbs through:

CUT TO:

320. INT. FIRST FLOOR CORRIDOR OF TOY FACTORY—MED. SHOT

As Bragg comes through the window. He starts down the corridor, CAMERA TRUCKING WITH HIM, until he reaches a contrivance set in the wall of the corridor, before which he pauses. He looks at the contrivance and sees:

Continued [273]

320. CONTINUED

INSERT: CLOSEUP

Burglar alarm—one of the type operated perhaps by the breaking of glass or some other appropriate means.

321. CLOSE SHOT

Bragg, before the burglar alarm. He look at it a moment, then his eyes travel upward toward the upper floor and into his face comes the portent of an evil impulse.

CUT TO:

322. INT. LARGE ROOM OF TOY FACTORY—TWO SHOT

Bill and Ira. Ira has gotten to his feet and is staring mournfully at Bill, who stands before him, gun in hand.

BILL

(uneasily)

What's the matter, Pop? What're you lookin' so sour about? Are you disappointed in me?

IRA

I'm not thinkin' of you. I'm thinkin' of  
your wife.

BILL

(starts)

My what?

IRA

Your wife, Trina—who trusted herself  
into your hands—who looks up to you—  
who—

He stops suddenly as the clangor of the burglar  
alarm fills the room. The bells can be heard ring-  
ing all over the factory building.

BILL

(harshly)

What's that?

Continued [274]

## 322. CONTINUED

IRA

(stuttering with excitement and anxiety)

Somebody set off the burglar alarm!  
There'll be cops all over the place in a few  
minutes—

As Bill stands undecided, he continues.

IRA

Well, what're you standin' there for?

(he starts pushing Bill toward the window)

Go on—beat it! Hurry—before they  
get here—

He practically shoves Bill through the window.

323. CLOSE SHOT

At window. Bill is halfway through the window when he suddenly recollects something. Pushing Ira aside, he gets back into the room—CAMERA PANNING WITH HIM—and picks up the little toy soldier from the floor where he had dropped it. He sticks it in his pocket then hurriedly clammers over the sill and out onto the fire escape.

All through this, the loud, brazen clangor of the burglar alarm, as we

FADE OUT.

[275]

FADE IN:

324. INT. IRA'S SHACK—NIGHT  
CLOSE SHOT

featuring Flossie's hands emptying the last of the dandelion wine from an inverted demijohn into a glass. As it falls into the glass with a soft gurgle, CAMERA PULLS BACK to show Flossie, seated at the table by the light of a kerosene lamp. Over the shot comes faintly the music of an accordion playing somewhere in the camp—which music will continue throughout most of this sequence.

Flossie tosses off the last glass of dandelion wine. She has a noticeable edge on. Having finished the glass, she inverts the demijohn again and a hopeless look comes on her face when no liquor comes out. She stares moodily at the empty demijohn, suppresses a hiccup, then—attracted by some noise she hears outside—she gets up and goes to the window of the shack.

## 325. CLOSE SHOT

Flossie at window, as she looks out and sees:

CUT TO:

## 326. EXT. BRAGG'S SHACK

MED. LONG SHOT

from angle of Ira's shack. Bragg stands in the doorway of his shack. He is flinging small pebbles at:

## 327. EXT. BILL'S SHACK

CLOSE SHOT

Featuring the small window of the shack as a couple of small pieces of gravel hit the window.

CUT TO:

## 328. INT. BILL'S SHACK

MED. SHOT

Trina, still attired in her wedding dress, is seated at the table, reading a Bible by the light of the kerosene lamp.

## 329. CLOSEUP TRINA

Her eyes are filled with tears.

INSERT: CLOSE UP

open pages of Bible—the type blurred and dimmed as though seen through a film of tears.

[276]

## CONTINUATION SCENE 328:

Trina hears a sound as more pebbles hit the window. She turns, rises and goes over to the window, CAMERA PANNING WITH HER. She peers out but in the dark can see nothing. She then goes to the door and exits.

CUT TO:

330. EXT. BILL'S SHACK  
MED. SHOT

as Trina comes out. She stands waiting and listening, looking about her. She still cannot see Bragg, but into the shot comes a sibilant hissing sound. She turns in the direction of the sound and slowly starts toward it.

CUT TO:

331. EXT. IRA'S SHACK  
CLOSE SHOT

Flossie in the doorway, watching.

CUT TO:

332. EXT. BRAGG'S SHACK  
MEDIUM SHOT

PANNING WITH TRINA as she approaches Bragg's shack. Bragg's voice comes into the shot.

BRAGG'S VOICE  
(in a low tone)

Trina—

As Trina starts at the sound of Bragg's voice, CAMERA PANS to include Bragg, waiting in his open doorway.

TRINA  
(suspiciously)  
What d'ya want?

BRAGG  
I got some news for you. Bad news.

(in a low, urgent voice)  
Come on in. I don't want nobody but you to hear it.

## 333. CLOSE SHOT

Trina, as she hesitates.

BRAGG'S VOICE

(low)

It's about Bill . . .

(Trina starts)

He's in trouble.

[277]

## 334. TWO SHOT

At this news Trina comes directly toward Bragg. He steps inside the shack, holding the door open. She enters.

CUT TO:

## 335. INT. BRAGG'S SHACK

TWO SHOT

as Trina enters. Bragg closes the door immediately.

CUT TO:

## 336. EXT. BRAGG'S SHACK

MEDIUM SHOT

as Flossie comes up to the door. She pauses before the closed door, frankly eavesdropping.

CUT TO:

## 337. INT. BRAGG'S SHACK

TWO SHOT

Bragg looks at Trina. He cannot keep his lustful desire from burning in his eyes. She glances toward the closed door and then back at Bragg.

TRINA

What is it?

BRAGG

Your boy friend got nabbed robbin' the safe at the top factory. They caught him with the goods.

TRINA

No—you're jokin', Bragg. Bill wouldn't do a thing like that. Bill ain't a thief.

BRAGG

That's just it. Steppin' out of his class. That's why he got caught. An' he was shot, too, tryin' to get away.

338. CLOSE SHOT

Trina, as she stares at Bragg, terrified, then starts for the door.

[278]

339. TWO SHOT

as Bragg bars her way, gripping her slim arms with his puffy, dirty hands.

BRAGG

(softly)

Wait a minute, honey—don't get upset. That ain't all I got to tell you. You got nothin' to be worried about. He may go down the river for a spell, but I'm still around. I'll always be around, baby, to take care o' you.

TRINA

Let me outa here!

She squirms in Bragg's grip. He lets go of her arm but still bars her way.

BRAGG

(devouring her with his eyes)

Sure. There's no hurry. I'll be here. Only—with Bill in the jug—you're goin' to need a man around. You an' me wouldn't make a bad team . . .

## 340. CLOSE SHOT

Bragg, as he continues:

BRAGG

Come on, kid—you might as well shake yourself out of it. Moonin' around won't get you no place.

## 341. CLOSE SHOT

Trina, as Bragg's voice continues:

BRAGG'S VOICE

Why get torn up about one guy like that?  
You might as well forget Bill for a while . . .

## 342. TWO SHOT

Taking in door of shack.

BRAGG

I say, you might as well forget

Continued [279]

## 342. (CONTINUED)

BRAGG (Cont'd.)

about him.

(raising his voice)

He's gone, ain't he? I tell you, he's gone.

The door opens and Flossie stands revealed in the doorway.

343. CLOSE SHOT

Flossie.

FLOSSIE

You're a liar, Bragg. He ain't gone.

344. THREE SHOT

as Flossie continues, to Trina:

FLOSSIE

Bill just got home. I saw him go into  
the shack a minute ago.

Trina pushes her way past Bragg and out.

CUT TO:

345. EXT. BRAGG'S SHACK

MED. SHOT

as Trina comes out and starts for Bill's shack, on a  
run, CAMERA PANNING WITH HER. She  
calls:

TRINA

(in a half-sobbing voice)

Bill—Bill!

CUT TO:

346. EXT. BILL'S SHACK

MEDIUM SHOT

as Trina reaches the door and enters.

CUT TO:

347. INT. BILL'S SHACK

MED. CLOSE SHOT

toward door, as Trina enters and looks about.

## 348. FULL SHOT

shack, from Trina's angle. There is nobody in the room.

[280]

## CONTINUATION SCENE 347:

She registers uncertainty and fright, and half turns as though to run out again. As she does, she is attracted by the thin sound of tiny bugle music playing "Reveille." She looks in the direction from which the sound comes.

CAMERA PANS AROUND to take in bed as the little tin soldier comes marching from behind the bed, goose-stepping toward Trina.

## 349. CLOSEUP

Trina, as she stares wide-eyed at the phenomenon.

## 350. MEDIUM SHOT

toward bed. The little soldier plays his bugle valiantly as he marches along toward Trina. From behind the bed, where he has been hiding, Bill gets to his feet, a grin on his face.

## 351. CLOSEUP

Trina's astounded face.

## 352. TWO SHOT

as she runs toward Bill and throws her arms around him, sobbing his name.

## 353. CLOSE SHOT

of the two as Trina, her overwrought nerves giving way completely, clings sobbingly to Bill. Suddenly she senses the fact that one of her hands embracing Bill is wet. She looks at it and her face contracts with horror as she realizes that it is blood.

CUT TO:

354. EXT. BRAGG'S SHACK  
TWO SHOT

Bragg in the open doorway; Flossie outside.

FLOSSIE

That was mighty decent o' you, Bragg,  
to offer to take care of Trina. I didn't  
know you had it in you.

(Cont'd.) [281]

354. (CONTINUED)

BRAgg

Well, she's a kind of a helpless little  
thing—the sort that needs lookin' after by  
a man.

FLOSSIE

(with a deceptive mildness)  
What's the matter with Bill?

BRAgg

He won't be around. Didn't he crack a  
crib?

FLOSSIE

He got away, didn't he?

BRAgg

For how long? The cops'll be down here  
after him.

FLOSSIE

How d'you know?

BRAgg

I got a hunch.

## 355. CLOSE SHOT

Flossie, as she looks straight at Bragg. She understands his implied threat.

## 356. TWO SHOT

Bragg tries for an instant to meet her scornful gaze, then, as his eyes drop:

CUT TO:

## 357. INT. BILL'S SHACK

## MED. CLOSE SHOT

Bill and Trina standing beside the table. She has taken off his coat and ripped off the sleeve of his shirt. There is a basin of water on the table. She washes his wound, her face a twisted mask of anxiety.

BILL

It's all right, I'm tellin' you. Just grazed me—ploughed a little meat off.

(half exasperated)

What's eatin' you? You'd think it was you got drilled, instead o' me.

(Cont'd.) [282]

## 357. (CONTINUED)

TRINA

I wish it was me.

(with a voice that's half a moan)

Bill, why did you do it? *Why?*

BILL

I couldn't check out leavin' you high an' dry, could I? That dough would've taken care o' you fine. But I flopped.

TRINA

(tearing a cloth for bandage)

I'm glad you did.

(she begins to bandage his arm)

I wouldn't've taken that money, anyway.  
I'da given it back.

BILL

Yeah? How d'you s'pose you'd have gotten along? It takes money to have a kid, don't it?

358. CLOSE TWO SHOT

toward Trina. She tried to smile.

TRINA

For a strong, husky man, you're awful afraid of a little bit of a thing that ain't even born yet. Goodness! If I'd'a known that it'd scare you so much, I never would'a told you. Gosh, I'd'a gone away myself. But I didn't know you were such a coward, darlin'—

359. CLOSEUP

Bill

BILL

(dazed)

Coward?

CONTINUATION SCENE 358:

TRINA

(all this time she has been bandaging his arm)

Sure.

(Cont'd.) [283]

## CONTINUATION SCENE 358 (Cont'd.)

TRINA (Cont'd.)

(there is something tender and motherly in  
the manner in which she chides him)

Afraid of a baby! Huh! The most natural thing in the world, you big fool They're born all the time. An' if they happen to be men kids, they never grow up— just keep reachin' for the clouds all the time, an' listenin' to train whistles.

(she finishes the *handaging* job and looks  
at him smilingly)

There! How's that?

## 360. MED. CLOSE SHOT

Favoring Bill. He desperately wants to weep, and sits down, trying to hide his emotion by looking down at the floor. She stands behind him, her hand on his shoulder, and she speaks to him gently and serenely.

TRINA

You know that song, Bill—the one that goes—

(she sings a line softly)

Fish gotta swim—

Birds gotta fly—

(she pauses)

You're such a silly—robbin' safes to get money when you always said you had no use for money.

BILL

(without looking up, speaks in a low tone)  
It wasn't for me.

TRINA

For me . . . I know. But I don't need any . . . I don't need anything . . . not even you.

He looks up at her.

TRINA

It ain't as if you ever said you loved me. You never did. An' I don't blame you. Don't you s'pose I know I'm just a stick-in-the-mud? A barnacle—that's what I am. I've held you back an' messed up your plans—but I didn't mean to . . .

She comes around and gets down on her knees before him.

[284]

361. CLOSE TWO SHOT

TRINA

You can go, sweetheart, and stay as long as you like. Maybe some day you'll come back . . .

(she adds hastily)

Not for good, I don't mean—just to visit. you might get lonely, sometime, and sorta curious an' wanna know what your son looks like—maybe. Gosh—even birds can't fly all the time, can they? They get tired an' have to come home sometimes. They got nests, haven't they? . . .

## 362. CLOSEUP BILL

His face is turned away from hers to conceal the twitching of his lips.

## 363. CLOSE SHOT

of the two. She senses what is happening inside of him and melts with pity. She reaches up, puts her arms around him and moves his head against her breast.

TRINA

(her voice breaking)

Sweetheart . . . sweetheart . . .

## 364. CLOSE SHOT

at door, as Flossie enters. She looks toward the figures of Bill and Trina. Over this—

TRINA'S VOICE

Please—please! I want you to feel right.  
I want you to be happy.

## 365. TWO SHOT

Trina and Bill.

TRINA  
(frantically)

I'll do anything if you'll only be happy.  
I'll give up anything—even the kid—if  
you'll only be happy!—

Flossie's cough comes into the scene and they look up.

366. THREE SHOT

FLOSSIE

Pardon me—

(to Bill)

Bragg tells me you took Ira's gun away from him. You better let me have it.

BILL

What for?

FLOSSIE

If the cops should happen to come down here an' find the gun on you, it might come under the headin' of damaging evidence.

367. CLOSE SHOT

Bill.

BILL

(suspiciously)

What makes you think the cops'll be here?

368. THREE SHOT

FLOSSIE

I got inside information from a stool-pigeon pal o' mine.

(irritably)

Come on—gimme the gat!

As Bill rises, she comes over and impudently starts frisking him. She locates the gun and takes it out of his pocket.

FLOSSIE

Now, Mr. Bindlestiff, your freight train's waitin'. You better hop aboard.

BILL

(surly again)

What for?

FLOSSIE

You got to beat it before the cops come.

Bill is silent a moment, looking from Flossie's face to Trina's anxious one. Then he speaks:

BILL

No. I'm stickin' around

[286]

### 369. CLOSE SHOT

Flossie.

FLOSSIE

Take my word for it—if you hang around here, you're due for the stir—an' I don't mean a weekend. The quicker you scram, the better.

### 370. THREE SHOT

BILL

No.

FLOSSIE

Bragg told me you pulled that safe crackin' job to get some dough for Trina. so you could beat it.

BILL

That's right.

FLOSSIE

An' now, when stickin' around means the Big House, you wanna linger. That don't make sense.

BILL

Maybe it don't but I can't leave Whoosits.

FLOSSIE

Well, you dumb sap, why don't you take her with you? Didya ever think o' that?

371. CLOSE SHOT

Bill.

BILL

No.

(after a pause, turns to Trina.)

What about it, kid? You wanna go?

372. CLOSE SHOT

Trina.

TRINA

Wherever you go.

[287]

373. MEDIUM SHOT

as Flossie edges over to the door.

FLOSSIE

(turning)

I got a great schnozzle for flat feet. I can smell harness bulls a mile away—an' they're practically on their way now. So you better not stop to pack.

She wavers a little unsteadily on her feet and manages a military sort of salute in farewell.

FLOSSIE

Happy landin'.

CUT TO:

She exits

374. EXT. BILL'S SHACK

MEDIUM SHOT

as Flossie comes out. She conceals the gun beneath a fold of her dress. PAN WITH HER as she makes her way rather unsteadily toward Bragg's shack.

CUT TO:

375. INT. BRAGG'S SHACK

MEDIUM SHOT

Bragg is waiting as Flossie enters.

BRAGG

(eagerly)

Well? . . .

FLOSSIE

I convinced him. He's hoppin' the next freight out.

BRAGG

Good.

376. CLOSE SHOT

Flossie.

(maliciously watching him)

Trina goes with him.

377. CLOSE SHOT

Bragg. His face falls.

BRAGG

(his voice rising angrily)

Oh, she does, huh? I didn't say anythin' about her goin'.

378. TWO SHOT

FLOSSIE

No, that was my idea.

BRAGG

Well, you're not goin' to get away with it. I got the goods on Bill. He even told me in advance he was goin' to pull that job, and he'll have a tough time explainin' that bullet wound. They'll pick 'em up before they leave camp—the both of 'em.

FLOSSIE

(mildly)

Not unless you squawk, Bragg.

379. CLOSE SHOT

toward Bragg, as he speaks malevolently.

BRAGG

Well, I'm *gonna* squawk. For the good o' the camp I'm *gonna* squawk. We don't want that kind of a guy around here. He'll always be bringin' the cops around. He's a criminal, he is. An' I'm thinking o' that poor little girl. What kind of a life would she lead, with a mugg like Bill?

(He starts toward the door)  
I'm goin' right out now an'

His eyes widen and his mouth remains open as he stops in sudden terror.

## 380. CLOSE SHOT

Flossie. She has the gun in her hand, pointed at Bragg. There is a savage joy in her eyes.

(Cont'd.) [289]

## 380. (CONTINUED)

## FLOSSIE

You're not goin' to squawk to the cops, Bragg—for the simple reason that stiffs don't squawk.

## 381. TWO SHOT

## BRAGG

(panicky)

Flossie—don't point that at me! You're drunk!

## FLOSSIE

I guess if somebody searched the whole country—maybe the whole world—they couldn't find two people more useless—more no good—than you an' me. Neither one of us has got any excuse for livin'. No use at all to anybody—not even to ourselves.

## BRAGG

(trembling with fear)  
You wouldn't commit murder!

FLOSSIE

This ain't murder. Just house-cleanin'. Stop your shakin'. It won't hurt. You'll be where you belong. An' me—I'm drunk—I'm not responsible. The State'll take care o' me—Some place to sleep regular.

382. CLOSE SHOT

Bragg.

BRAGG

(in a strangled voice)

Flossie!

FLOSSIE'S VOICE

Close your eyes, Bragg.

A pitiable specimen of terror, he closes his eyes and his knees sag as into the scene comes the sound of Flossie shooting. She empties the gun into Bragg's body. As he slumps to the floor . . .

DISSOLVE TO:

[290]

383. INT. MOVING CATTLE CAR—NIGHT

MEDIUM SHOT

This is an open car, roofless, with a piled up bunch of straw at one end upon which Bill and Trina are seated, leaning comfortably back. Over the scene comes the steady click-click of the train on the rails. Bill is smoking a cigarette. Both he and Trina are looking up at the stars overhead.

TRINA

I'll certainly miss it . . .

(he gives her an inquiring look and  
she adds, wistfully)

It *was* such a beautiful stove.

BILL

Ah-h—you can always get another one  
on the installment plan—a better one, too.

He remains thoughtfully smoking, apparently trying  
to figure something out.

#### 384. CLOSE SHOT

of the two, as she watches him. He begins to count  
on his fingers.

BILL

(half-audibly—tallying on his fingers)

August-September-October-November-  
December—

(to Trina, enquiringly)

December, Whoosits?

TRINA

(nods and smiles)

December. A sort of a Christmas pres-  
ent, Bill.

She leans further back on the bolster of straw,  
supremely happy and contented. The sound of the  
train whistle comes into the shot.

385. CLOSEUP

Trina, as she hears the train whistle. She smiles serenely. The train whistle is no longer the dreaded enemy, but is now her friend. It has a lovely, homey sound.

[291]

386. TWO SHOT

The bodies of the two rock gently with the motion of the freight train. Suddenly a peculiar expression comes into Trina's face, half startled, half wondering, and altogether joyous. She speaks without turning, to Bill.

TRINA

Bill!

He turns enquiringly—Without speaking, she takes his hand and places it over her stomach. A startled expression comes on Bill's face and he looks wonderingly at Trina.

BILL

(low)

Geez! It's movin'.

TRINA

(almost inaudibly)

Life.

Again the whistle comes into the scene, as we

FADE OUT.

The End.

[292]

## EXHIBIT B TO STIPULATION

February 10, 1944

Columbia Pictures Corporation,  
Columbia Square,  
Hollywood, California

Gentlemen:—

In consideration of the payment by me to you of the sum of Seven Hundred Fifty (\$750.00) Dollars, you grant to me the license to produce one (1) radio broadcast based upon your motion picture photoplay entitled "Man's Castle" on the Goodyear program which I am producing on February 20, 1944.

You further grant to me a license to make two radio broadcasts by electrical transcription of the above-mentioned radio adaptation, one in the territory of Hawaii and one in the territory of Alaska; such electrical transcription broadcasts shall, however, be made within a period of one hundred and twenty (120) days from and after the broadcast of the adaptation of said photoplay on the Goodyear Company program.

Immediately upon producing a radio broadcast of said motion picture version, I shall have no further rights therein (except to broadcast said electrical transcriptions as herein specifically provided).

You agree to permit me to use copies of the screen play and dialogue continuity of said motion picture version for the purpose of making, at my expense, a radio adaptation thereof, and you agree to furnish said copies upon my giving you reasonable notice as to the time I require them. I shall have the right to condense, modify, and adapt the abovesaid motion picture version in such

manner as to conform to the requirements and needs of radio broadcasting. [294]

Immediately upon the broadcast of the radio adaptation based upon the abovesaid motion picture version, I agree to return immediately to you any copies of the screen play and dialogue continuity theretofore furnished by you to me.

I expressly agree that I will not make any transcriptions for broadcasting purposes other than specifically provided above.

It is understood that you do not grant nor purport to grant to me the right to broadcast any of the music recorded in connection with said motion picture version; however, you agree not to object to my use of the music provided that I secure the rights and proper permission and license from the copyright owners of said music.

In all advance radio announcements and immediately preceding the presentation of the broadcast of my radio adaptation of said motion picture version, I agree to announce the title of said motion picture version and the fact that it is a Columbia Pictures Corporation production.

You hereby grant me the license to use the name of said photoplay in any proper way in connection with the advertising and/or publicizing of the said radio program produced by me.

I agree not to assign any rights under this agreement to any other person, firm or corporation without your written consent, and you agree not to unreasonably withhold such written consent.

I am not liable for any charges for brokerage or commission in connection with this agreement.

It is understood that one (1) radio broadcast, as such term is used herein, may include a broadcast and re-broadcast on the same day. [295]

You hereby warrant that you have acquired by agreements with the respective authors of the literary works upon which the abovesaid motion picture photoplay was based, or any other persons having any financial or other interests therein, the right to broadcast by radio versions or adaptations of said motion picture photoplay, and that you have heretofore fully complied with all the terms and provisions of said agreements. You further warrant that you have not heretofore granted or disposed of any right, title or interest in the abovesaid literary works or in the abovesaid motion picture photoplay which might invalidate or impede the enjoyment by me of any of the rights granted herein.

You agree that you will not license or grant to any person the right to broadcast by radio any version or adaptation of said motion picture photoplay until such time as I have completed the radio broadcast on February 20, 1944, of my version or adaptation thereof.

If the foregoing meets with your approval, your signature in the space provided in the lower corner, together with mine hereunder, will constitute this a valid and binding agreement between us.

Yours very truly,

(Signed) Wm. Morris Agency  
as Agents  
Walter Pidgeon

Agreed to and accepted:

COLUMBIA PICTURES CORPORATION

By (signed) B. B. Kahane

Vice-President [296]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
ON TRIAL

Hon. Ben Harrison, Judge Presiding  
Tuesday, September 12, 1944

10:00 o'clock A. M. [297]

The Clerk: No. 3527-Civil, Lawrence Hazard vs.  
Columbia Broadcasting System et al.

The Court: Proceed.

Mr. Loewenthal: I don't know, if the Court please, just how much more your Honor wishes to hear. I think everything that could be said by way of argument is included in the brief that plaintiff submitted, and is entitled, I think, Pre-trial Brief. I have one or two points that I would like to bring up at this time.

Mr. Knupp: Have you any additional evidence to introduce?

Mr. Loewenthal: Yes. I think Mr. Knupp and I have one point of evidence that we can also dispose of by stipulation.

The Court: Very well.

Mr. Loewenthal: I have here a printed form of contract, which is entitled, "Columbia Pictures Corporation of California, Ltd., Assignment of all Rights." I would like to present this to the court and have it considered as evidence. Mr. Knupp has stated that he will stipulate that this is a printed form of contract which, at one time or another, was issued by Columbia Pictures, purporting to assign the rights that are covered by this contract. I don't ask Mr. Knupp to stipulate that it is competent, or anything of that kind, but merely that it

is a copy of a printed form of contract which, at one time or another [298] was issued by the Columbia Broadcasting System.

Mr. Knupp: I think, if your Honor please, that is a form of contract which Columbia used at one time. I am not sure of the time when it was first used, but I think it is entirely incompetent in connection with this case, because it purports to assign all of the rights to all productions, literary work, or story, or anything of that kind, including copyrights. I don't see that it has any bearing on this question at all as to the motion picture rights or what the rights of the assignee are, if the court please.

The Court: Suppose we mark that for identification at this time.

Mr. Loewenthal: My point in presenting it is so that the court can see the language that Columbia Pictures at one time or another used. It is argument.

Mr. Knupp: It isn't even argument, unless the plaintiff in this case used that form of contract, or was familiar with that form of contract.

Mr. Loewenthal: That is not the point. We didn't think we had this kind of contract. This is a contract under which the radio rights clearly passed. We contend, under our contract, that the radio rights do not pass. Now, I present the two together, so that the court can see the language used by Columbia Broadcasting in its printed form.

The Court: I don't think that is important. Mark it for identification. [299]

Mr. Loewenthal: Mr. Knupp, you have a stipulation that you would like to read?

Mr. Knupp: Mr. Loewenthal has agreed with me, if the Court please, that he would stipulate to these facts: That the radio adaptation which was broadcast by the defendant Pidgeon, was written by one Charles Tazewell, and that Tazewell, if called as a witness in this case, would testify that he wrote the radio adaptation entirely from the screen play, that is to say, the motion picture scenario, and the dialogue, and that he did not have before him and had no access to the plaintiff's original dramatic composition.

Mr. Loewenthal: I will stipulate that those are facts, but I do not consider particularly that those facts are competent, because the scripts speak for themselves. I think the script tells the story, and I don't think it makes very much difference which document he read at the time he made the radio adaptation. Regardless of which original manuscript he may have read or copied from, when he finally got through the complete work, if it violates this contract, it makes very little difference where he got it.

The Court: I am going to admit that in evidence, under the stipulation.

Mr. Knupp: I think that is all the evidence we have.

The Court: Gentlemen, let me ask a few questions, which perhaps will clarify this matter. Is there any dispute [300] over this fact: That if there had been no contract in this case, that the radio adaptation as you call it, would have been an infringement of the copyright of the original play?

Mr. Knupp: I don't think there is any question about that, if the Court please. I think that is shown clear enough by a comparison between the radio adaptation and the story.

The Court: That was my conclusion in reading the different scripts submitted to me.

Mr. Knupp: That is right.

The Court: Then it comes down to the real question here of an interpretation of the contract—isn't that the real issue in the case?

Mr. Loewenthal: That is right. We are agreed on that. We can decide the case without evidence, when you come right down to it.

The Court: I have read the brief, and will read it again, if necessary. But I was interested in this contract attached to the answer, that is, the portion commencing on line 17 of page 4, attached to the answer.

Mr. Loewenthal: Which is that?

The Court: That is the agreement of March 25th, between Lawrence Hazard and the Columbia Pictures Corporation of California.

Mr. Loewenthal: Is that paragraph three of the contract? [301]

The Court: No. It is part of paragraph one.

Mr. Loewenthal: What I have referred to as the granting clause of the contract?

The Court: Well, paragraph one—"The owner hereby grants," etc., and then the second paragraph, all interest as it is there set forth in the answer: "The owner hereby grants to the purchaser the exclusive right to make motion picture versions and silent and/or sound and/or talking and/or musical motion picture versions of such work (all such versions being hereinafter included and embraced in the expression "motion picture versions")." That is the first thing. And then it says: "to translate, adapt, arrange, change, transpose, add to and subtract from such work and the title thereof, to such extent as

the purchaser may deem expedient." That is another grant, is it not? And another one is: "to use excerpts from such work for the title, subtitles, text and dialogue of such motion picture versions, to publish, for the purpose of advertising and exploiting such motion picture versions, in such form as the purchaser may deem advisable, including its publication in newspapers, fan magazines and trade periodicals, a synopsis or story of such motion picture versions, not exceeding, however, ten thousand words in length."

And then it says: "to use excerpts"—

Mr. Loewenthal: May I interrupt? I don't think that ends that grant. I think you have to go further to see [302] what that particular grant embraces. I think the following language is a part of that same grant.

The Court: But, of course, we are getting down to the point. On line 1 of page 5 of the answer, it says: "to broadcast sketches of such motion picture versions." That is the gist of it, to me. What does that mean?

Mr. Loewenthal: That is why I interrupted by saying that you have to read that language in that part of the contract. I think here is the way it should be read: "to use excerpts from such work in heralds, programs, booklets, posters, lobby displays, press, books and all other mediums of advertising and publicity whatsoever, to broadcast sketches of such motion picture versions, to use parts of such work or of the theme thereof in conjunction with other work or works in the making of motion picture versions." Now, that is the first reference in the contract to broadcasting, isn't it?

The Court: Yes.

Mr. Loewenthal: If your Honor will examine that particular part of the contract you will come to the con-

clusion that the broadcasting rights are there limited and restricted to two conditions: Sketches in a complete play. And I tried to define "sketches", and Mr. Knupp attempted to do so. I don't think either one of us has succeeded in making a complete definition of it. But I think what is meant by "sketches" is what we see when we go into a motion picture, when they throw on the screen what they call a [303] trailer of some future attraction. That is a sketch.

The Court: That would be a picture.

Mr. Loewenthal: They could do the same thing in a broadcast, but that isn't broadcasting the whole play; it is a sketch, or a trailer. In other words, they take the action and theme, something that will attract the attention of the public, and they either do it over the air or throw it on the screen, to portray a coming attraction. You know, when you go to a motion picture theater, one of the things you have to sit through is a teaser of a coming attraction. That is known as a trailer; it is a preview of a part only, and that is what they mean by "sketches". This is clearly not a sketch; this is the whole play.

And number two in this same paragraph; I think they can only broadcast sketches in connection with the previously used language, the preceding language. I think they can broadcast a sketch only, and then only for advertising purposes, and this is clearly not an advertising of the picture. This was for the Goodyear—

The Court: I know, but if this word "sketches" has some peculiar meaning in the moving picture industry, we should know it; otherwise, we have to accept the ordinary definition.

Mr. Loewenthal: I think we should accept the ordinary definition. I don't think there is any evidence,

nor is it a fact, that the word "sketch" has any strange or unusual [304] meaning in the industry from what it has generally. I went to the law books to find a satisfactory definition of the word "sketch", and I wound up with one Webster, and then I wound up with another Webster. That is the only definition of "sketch" that is available. I don't think it has any different meaning in the industry than in public use. It isn't a whole play; it is a scene, or an act.

The Court: This was, you might say, a digest of a play, is what it really was.

Mr. Loewenthal: But it is a digest of his play. Every argument defendants made in their brief—for instance, as to how it was condensed—let me read you. I think we are inclined to be thrown off either way, because it is such a delicate question.

The Court: Now, the broadcasting follows the general line of the moving picture play.

Mr. Loewenthal: It does, and the original work also.

The Court: And it is also true that it follows the sequence of events more closely, as far as the picture is concerned, but you can see that they all come from the same source, as far as that is concerned; when you follow it back, it all goes back to the one source. But the only question in my mind is the interpretation of this contract, and that particular portion of that grant.

Mr. Loewenthal: I think if the court will again study the brief that we filed, with respect to that point, [305] there isn't another argument that I could make on that part of the contract that is not included in the brief.

The Court: What do you say, Mr. Knupp?

Mr. Knupp: I have very little to add. I think your Honor is entirely correct in the interpretation of that first paragraph of the contract. Those rights are all separate and distinct rights. For instance, the right to broadcast sketches of the motion picture version has no connection whatever with the right which is given in the following clause, so I think those are all separate and distinct rights and are in no way connected with or dependent on one another, and I can't conceive of any possible way of giving to the picture corporation the right to broadcast the sketch or motion picture version, unless it was what was done here. He sold the right to make a broadcast of a sketch of the dramatic composition instead of a sketch of the motion picture version. Unless we had already acquired that right under our contract—Mr. Loewenthal argues that that clause relates to a broadcast by which the motion picture exhibitor excites public interest, which is referred to as a teaser or a trailer. Those exhibitions on the screen are not of such character that they could be broadcast at all. They usually show just a few scenes, and, if any dialogue at all, it is just a few words of dialogue.

The Court: Have you gentlemen stipulated what the value would be, in the event I find for the plaintiff? [306]

Mr. Knupp: There are two possible rules of damage, if the court please, I don't know whether this is a case which comes under the general rule that the plaintiff is entitled to the damages he suffered, plus profits, or whether it comes under the rule in which, it being impossible to establish profits, the court may award to him damages which the court establishes, a minimum of \$250.00 and a maximum of \$500.00.

The Court: It wouldn't be difficult to ascertain the profits in this case, would it?

Mr. Knupp: I don't know what the basis of determining profits would be in this case.

The Court: It would be the profits from the broadcast, it seems to me, and that would arise from what the parties that broadcast the—

Mr. Loewenthal: No, I think not, your Honor. I believe this is the measure of damage, that the gross profits derived by, let us say, Walter Pidgeon, after deducting his direct overhead, is one element of damage; what Columbia Broadcasting System received, after deducting overhead, is another element; and what Columbia Pictures received from Walter Pidgeon for the rights granted to Pidgeon to broadcast is another element of damage. When Mr. Knupp and I discussed the procedure of this case, it was my thought that it was foolish to take the time of the court to go into the question of damage until we found what the court's ruling on this [307] general interpretation of the contract was going to be. My idea was that if the court finds for the plaintiff, then we can go into the question of damages, and until then what is the use of discussing it?

The Court: Well, I want to dispose of it, if I can.

Mr. Loewenthal: We will have to have evidence, then, on that point.

Mr. Knupp: I don't follow Mr. Loewenthal's ideas as to what would constitute the profits. I would think it would be the profits which were derived by Pidgeon, who probably had charge of the broadcasting and was responsible for it, and that those profits would be the profits that might be attributed to the use of this play, and would have to be determined by a study of the entire profits to determine what part resulted from the use of this play, and what part resulted from the services

of Loretta Young, or whoever was in the broadcast with him. That seems to be the rule with respect to literary work, and then the court would determine the portion of the profits arising from the different factors which contributed to this proposition. In one case they allowed twenty per cent of the profits as a result of the infringement, the use of the literary work. I don't know how it is possible in this kind of a case to determine what the profits were.

The Court: I am afraid it would make a terrific judgment, which the court, naturally, tries to avoid, because [308] the evidence here shows that they paid \$2500.00 for the picture rights.

Mr. Loewenthal: I don't think that much, was it?

Mr. Knupp: Yes. Columbia paid \$2500.00 for the motion picture rights, and Pidgeon paid \$750.00 for the right to broadcast this sketch or radio adaptation of the motion picture version.

The Court: Well, any judgment would be against Columbia, wouldn't it?

Mr. Knupp: Columbia is not a party to the action, if the court please. The judgment would be against those who participated, I presume.

The Court: Gentlemen, I will try to determine this matter in the next few days, and, if I hold for the plaintiff I will set down as early a date as possible to determine the damages.

Mr. Loewenthal: May I just urge the court, before we close, to remember one thing, and that is that I think a reading of the contract would show that Columbia Pictures would have a right to make the motion picture, and, of necessity, they needed some broadcasting rights for the reasons I have given in my brief. But I don't think that

it ever was intended to give them general broadcasting rights. It was strictly a motion picture right contract; it was not a radio right contract; and the radio rights are incidental to the motion picture rights. They never intended to give [309] general broadcasting rights. We wouldn't be here today if that were not the case. There is certainly something in this contract which throws a great deal of doubt upon the defendants' right to broadcast this picture, and, if that is so, then the plaintiff is the exclusive owner, and the plaintiff would have been prohibited from even broadcasting his own original play, and that is the incongruous part of it. I don't think it was ever intended that he should be deprived of the right to broadcast his own original work, but he would be, if counsel's position here is correct.

The Court: No, I don't think that is true. I think either one of them could have broadcast, if the defendants' position is correct, because they only had a right to broadcast the picture adaptation. As far as that is concerned, the contract has that one clause in there, as part of a sentence, that I am having difficulty in getting around. It looks like it was just stuck in there, but it looks like somebody is stuck by reason of it.

Mr. Loewenthal: I will tell you what I think about the contract.

The Court: It doesn't make any difference what you think. You didn't draw the contract. It came to your knowledge just as knowledge has to come to you or Mr. Knupp. When I first read this contract I thought that perhaps it was tied into the advertising feature. The more I study it, [310] the more I am inclined to follow the defendants' interpretation. I am speaking out loud and speaking frankly, so that counsel will know how I

feel. I am going to now take the matter under submission and read and study both briefs again.

Mr. Knupp: Paragraph three gives them the right to broadcast the motion picture version. As far as having broadcasting rights, the contract itself shows that we could have broadcast the entire play. But we have broadcasting rights, in addition to what is provided in that one paragraph.

The Court: Would that right include the resale?

Mr. Knupp: It would seem so to me, your Honor.

The Court: I can't adopt the view that they had a right to broadcast generally, anyway. This contract uses language which doesn't mean very much. Let me ask you this question.

Mr. Loewenthal: If there is any ambiguity, the construction must be *again* Columbia.

The Court: What I am getting at is this: If this case goes to the Circuit Court for interpretation of that contract, so as to eliminate future litigation—

Mr. Knupp: I don't suppose we could establish any testimony with respect to this particular contract, because every motion picture producer uses a different form of contract.

The Court: Well, the case is submitted, and I think [311] I will spend the balance of the day on it and try to reach an early conclusion.

Mr. Loewenthal: When you come to a conclusion, when you find out what the expression "motion picture version" means, I think it will be enlightening to all of us.

The Court: I may be mistaken, but in other cases I have had here, of violation of copyrights, etc., we have found out that when a script is sold, then it is turned

over to the writers of the studio, and they revamp and rehash it, and sometimes you can hardly recognize the script, or it is only through very close scrutiny that you can recognize it. In this case it is very apparent. But, as I understand, the motion picture version is the script from which the motion picture is made.

Mr. Loewenthal: I don't think so, your Honor.

Mr. Knupp: That is what I understood, if the court please. I thought what we filed with the court as an exhibit was a motion picture version.

The Court: I have read so many of these scripts, and I am trying to figure out whether I have seen the picture or not. I read one some time ago, and another one I just read, and I couldn't determine in my own mind whether I had seen the picture or read the script.

Mr. Loewenthal: The original story, by the way, I think is a very good story. I think it was somewhat garbled [312] in the original production, but I thought the original was a very beautiful story. But, getting back to a discussion of the version, I have heard discussions and arguments among lawyers—

The Court: I am not going to attempt to define any terms, but I do have to know what they mean. In that way you always get in trouble. I believe one meaning of the expression "motion picture version" is what you see when you go to see a motion picture, what you see on the screen. The motion picture of it is visualized for you on the screen, is what you see with your eyes, not alone because there is sound in connection with it, but it may be the combination of sound and the optical part of it as well, or it may be what you see on paper. It isn't such a simple thing as merely saying, "Well, the motion picture version is what is left on a piece of paper

after the writers get through tearing the original story to pieces." When I go to a motion picture theater I don't see that paper, but I do see the motion picture version. I haven't seen the paper that the author wrote on, so you can't say that what is on the paper is necessarily the motion picture version. I understood there was a stipulation here as to the version.

Mr. Loewenthal: The motion picture version, the motion picture script. But when we talk about broadcasting a motion picture version, I am by no means certain that it [313] wasn't intended only that the motion picture company, when it got its sound track and negative ready for showing on the screen, that it couldn't put that same box of film in a radio broadcasting station, and broadcast by television in your own home the picture that you would see in a motion picture theater.

The Court: Let me ask you this: It seems to me that I have been able to visualize it from the script quite well in my own mind. I have no desire to see it, because I know what the story is. The descriptions of the scenes, etc., were quite complete.

Mr. Knupp: I thought that, as it was filed with the Court, it was a true representation of what actually appeared on the screen. If there is any question about that, I would like to have the Court see the picture.

The Court: I don't question the fact that the picture which was shown on the screen is not actually depicted in the shooting script. My point is as to the physical thing; what is the version? Is it the film; is it what you see on the screen; or is it the paper, with the general continuity of plot? We know they couldn't broadcast the scenes, except with the little-used television.

Mr. Loewenthal: That is what that contract, in my opinion, is for, that there will come a day some time

when that is the way motion pictures will be shown, and I think [314] that is all the draft of this contract intended to do. Of course, you couldn't broadcast a sketch of a motion picture version, taken direct from the motion picture version; they would have to make it for that purpose. They might make it differently.

The Court: Gentlemen, this contract was drawn eleven years ago.

Mr. Loewenthal: That is why it was indefinite. They didn't know what they were talking about.

The Court: And we have waited eleven years; and we just read about television.

You may file this, Mr. Clerk.

The Clerk: That will be for identification. [315]

[PLAINTIFF'S EXHIBIT NO. 1 FOR  
IDENTIFICATION]

COLUMBIA PICTURES CORPORATION  
OF CALIFORNIA, LTD.

ASSIGNMENT OF ALL RIGHTS

Know All Men By These Presents:

1. That the undersigned, hereinafter referred to as the "Author," whether one or more, for and in consideration of the sum of Ten Dollars (\$10.00) in hand paid, and other good and valuable consideration, the receipt of all of which is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over, forever unto Columbia Pictures Corporation of California, Ltd., hereinafter referred to as the "Purchaser," all common law rights and/or all the copyrights, and/or the right to secure copyright, in the United

States and all other countries of the world, in the name of the Purchaser, or otherwise, in the Purchaser's sole discretion, in and to that certain.....

---

---

hereinafter referred to as the "Work," written by the Author, including the title and theme thereof, all right and title in the manuscript thereof, and all now or hereafter existing rights of every kind and character whatsoever pertaining to said Work, whether or not such rights are now known, recognized or contemplated and the complete and unconditional and unencumbered title in and to said Work for all purposes whatsoever, and including also under such grant, sale and assignment, without in any way limiting or restricting the same, the entire literary, publication, novel- [316] ization, dramatization, performing, mechanical reproduction, radio and other broadcasting, television and silent, sound, talking and/or musical motion picture rights therein for all countries of the world and in all languages and any and all other rights of any character that may hereafter be invented, discovered or come into existence.

The rights herein granted, sold and assigned include the unrestricted right to translate (into all languages), adapt, arrange, change, transpose, add to, interpolate in and subtract from such work and the title and them thereof to such extent as the Purchaser, in its sole discretion, may deem expedient in the exercise of the rights granted, sold and assigned to it, and to use parts of such work or of the theme thereof in conjunction with any other work or works, in any manner.

The rights herein granted, sold and assigned also include the unrestricted right to use excerpts from such

work for the title, subtitle, text and dialogue of any novelization, dramatization, motion picture or any other versions of such work and to advertise and exploit such work and any and all versions thereof in any manner as the Purchaser may deem desirable and to secure copyright and/or copyright registration in any and all such versions in the Purchaser's name or otherwise in the Purchaser's sole discretion.

The Author hereby grants, sells, assigns and sets over to the Purchaser forever all renewals of copyright and/or the right to renew and secure renewals of copyright, in all countries, in the name of the Author and/or the Purchaser and/or otherwise, in the Purchaser's sole discretion in such work and in any and all versions made in pursuance hereof, including under such grant, sale and assignment, without in any way limiting or restricting the same, all the rights specified in the first paragraph [317] of this Article, which may be created under any such renewal of copyright or which may otherwise exist or come into being, and for the purpose of executing, delivering and filing any documents that may be necessary, proper or expedient to renew or secure renewals of any such copyrights the Author appoints the Purchaser, its successors or assigns, the Author's attorney-in-fact, irrevocably.

2. The Author hereby appoints the Purchaser his true and lawful attorney irrevocable, in the Author's name or otherwise, but for the Purchaser's sole benefit and at the Purchaser's expense, to enforce and protect any and all rights in such work and/or in any versions thereof, under the common law and/or under any and all copyrights and renewals of copyrights and to prevent the infringement thereof and to litigate, collect and receipt for all

damages arising from any infringement of such rights and to join the Author in the Purchaser's sole judgment, as a party plaintiff or defendant in any such suit for infringement.

3. The Author warrants that the Author is the sole owner of the right to secure copyright, and of the manuscript of such work, and of all rights of every character in such work and has full right and authority to grant the rights hereby conveyed. The Author further warrants that such work is original with the Author in all respects and that no incident therein contained, and that no part thereof was taken from or based upon any other literary or dramatic or musical work or any motion picture or in any way infringes upon the copyright or common law right or the literary, dramatic, motion picture or any other rights of any party whomsoever; that such work is not in the public domain; that the literary, dramatic, motion picture and all other rights in such work have in no way been sold, mortgaged or otherwise disposed of and are free and clear of any liens or claims what- [318] soever in favor of any party whomsoever; that the title of such work, mentioned in Article 1 hereof, may be used as the title of any such literary, dramatic, motion picture or other versions; that the reproduction and exhibition of such work in the form of literary, dramatic, motion picture or other versions will not in any way infringe upon any rights of any party whomsoever; that the Author has done no act or thing that can in any way prevent or interfere with the full enjoyment by the Purchaser of the rights hereby acquired.

The Author agrees and guarantees to defend, indemnify and hold the Purchaser harmless against any losses, damages, expenses or judgments which may be sustained or

suffered by or secured against the Purchaser by reason of the use of the title of such work for the title of any such literary, dramatic, motion picture or other versions, or of any infringement of any copyright or common law rights or any literary, dramatic, musical or motion picture or other rights, on account of any use which the Purchaser may make of such work in the making of any literary, dramatic, motion picture or other versions thereof, the distribution, exhibition, performance, exploitation or other disposition of any such versions, or the exercise or attempted exercise of any of the rights hereby granted.

The warranties contained in this article apply only to the material used in any such versions taken from such work written by the Author and do not in any way apply to any extraneous matter inserted by the Purchaser in any such versions.

4. Without in any manner limiting the unlimited grant, sale and assignment herein made, the rights herein granted, sold and assigned to the Purchaser include the exclusive right to make, use, sell and otherwise exploit and dispose of disc records, sound on film, and any and all other mechanical contrivances or devices for the recordation of [319] the sound and talking and musical and other audible portions of any motion picture versions and for the reproduction and performance of all such sounds as part of or incidental to the exhibition thereof, and also include the exclusive right to project by television, radio, electricity or in any other manner any such motion picture versions, including the sound, talking, singing and other audible portions thereof, through space, for exhibition and performance at any and all places away from that wherein any such motion picture versions shall be exhibited and performed.

5. The Author agrees to duly acknowledge, execute and deliver, or procure the due execution, acknowledgment and delivery to the Purchaser of any and all further assignments and other instruments that may be necessary or expedient to carry out and effectuate the purposes and intent of this agreement and to convey to the Purchaser all rights in such work, as long as any rights in said Work are recognized in law or in equity. Purchaser shall have the right, but shall not be obligated, to use the name of the Author as the Author of such work in connection with this work and/or with any versions of any character thereof.

6. Wherever in this assignment reference is made to the Author, it shall be deemed to embrace and include the Author's heirs, executors, administrators, next of kin, successors and assigns, and wherever reference has been made to the Purchaser, such reference shall be deemed to include and embrace its successors and assigns and the Purchaser shall have the free, full, unrestricted and unlimited right to sell, assign, transfer or otherwise dispose of this assignment, and/or any or all of its right, title and interest thereunder, in whole or in part.

7. This assignment shall enure to the benefit of and be binding upon the respective heirs, executors, administrators, next of kin, successors [320] and assigns of the parties hereto.

8. Wherever the context of this assignment requires it, the masculine shall be deemed to embrace and include the feminine, and the singular shall be deemed to embrace and include the plural, and all Authors executing this assignment shall be deemed to be jointly and severally obligated and bound hereby.

9. .....

---

---

---

---

---

---

---

State of California      )  
                              ) ss  
County of Los Angeles )

On this ..... before me, a notary public in and for said county, personally appeared ..... known to me to be the person.... whose name..... subscribed to the foregoing instrument, and acknowledged to me that..... executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in said county the day and year in this certificate first above written.

---

Notary Public in and for the County of Los Angeles.  
State of California.

[Endorsed]: No. 3527-BH Con. For Identification.  
Pltfs. Exhibit No. 1. Marked: 9/12/44. By M. E. Wire,  
Deputy Clerk. [321]

[Title of District Court and Cause.]

## MEMORANDUM OPINION

The right of the plaintiff to recover depends upon the interpretation of the contract dated March 25, 1933. Did or did not the plaintiff grant to the defendants the broadcasting privileges which they exercised? In Paragraph 1 of said contract, plaintiff granted to defendants the right "to broadcast sketches of such motion picture versions." Again Paragraph 3 provides: "The motion picture rights herein granted and assigned to the purchaser by the Owner(s) include the exclusive right to make and use disc records, sound on film, and any and all other mechanical contrivances or devices for the recordation of the sound and talking and musical and other audible portions of any such motion picture versions and for the reproduction and performance of all such sounds as part or incidental to the exhibition thereof, and also include the exclusive right to project by television, radio, electricity or in any other manner any such motion picture versions, including the sound, talking, singing and other audible portions thereof, through space, for exhibition and performance at any and all places away from that wherein any such motion picture versions shall be exhibited and performed."

Both parties endeavor to draw fine distinctions over the meaning of "versions". Our Circuit Court had its troubles over a [322] phrase including the word "versions", (Corcoran v. Montgomery Ward Co., 121 F. (2d) 572-3) but the cited case gives us little aid in this case.

Plaintiff in his pre-trial brief on page 9 gives the definition of "version" as found in Webster's Dictionary and as a part thereof quotes as follows: "3.—An account from a particular point of view, esp. as contrasted with another account, as, two versions of the same affair."

In this case we have the author's story as represented by his script, while on the other hand we have a version of the same affair as produced and developed by Columbia Pictures. It was this version that was broadcasted and it is my opinion the plaintiff granted the right to do so.

Defendants are entitled to judgment and are directed to submit proposed findings and judgment within ten days.

Dated: September 14, 1944.

BEN HARRISON

Judge [323]

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled action came on regularly for trial before the above entitled court, Honorable Ben Harrison Judge thereof, plaintiff appearing through his attorneys, Messrs. Loewenthal & Elias and Paul Loewenthal, Esquire, and the defendants appearing through their attorneys, Messrs. Mitchell, Silberberg & Knupp and Guy Knupp, Esquire. The parties filed herein a stipulation of facts and additional evidence was offered by each party. The court has read and considered said stipulation and the evidence offered by the parties, and now makes and files its Findings of Fact and Conclusions of Law as follows:

### Findings of Fact

1. Jurisdiction of the action is founded upon Section 34 of the Copyright Laws of the United States of America, being Title 17 U. S. C. A., Section 34.

2. Prior to May 28, 1932, plaintiff, who was then and ever since has been a citizen of the United States, created and wrote a [324] dramatic composition entitled "A Man's Castle," which has not been reproduced in copies for sale.

3. Said dramatic composition contains a large amount of material wholly original with plaintiff, and was and is copyrightable subject matter under the laws of the United States. Said dramatic composition is attached to the complaint herein as Exhibit 1.

4. On or about May 28, 1932, plaintiff complied in all respects with the provisions of the Copyright Act of 1909 as amended, and particularly with the provisions of Section 11 of said Act, and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said dramatic composition, and received from the Register of Copyrights a certificate of registration dated and identified as follows: "May 28, 1932, Entry: Class D2, No. 16584."

5. Since May 28, 1932, plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyright in said dramatic composition, save and except such rights, and such title and interest therein, as was granted by said plaintiff to Columbia Pictures Corporation of California, Ltd. under the terms of an agreement between said corporation and the plaintiff dated March 25, 1933, a copy of which agreement is attached to the answer of the defendants Columbia Broadcasting System, Inc., Walter Pidgeon and Young & Rubicam, Inc., and marked Exhibit A.

6. Columbia Pictures Corporation of California, Ltd., pursuant to the agreement referred to in the preceding paragraph, prior to the year 1944, made, prepared and produced a motion picture version of the dramatic composition entitled "A Man's Castle," the screenplay and dialogue continuity for which motion picture version is attached to the stipulation of facts herein as Exhibit A. Thereafter, and prior to February 10, 1944, Columbia Pictures Corporation of California, Ltd., a California

corporation, [325] was merged with Columbia Pictures Corporation, a New York corporation, under the name of Columbia Pictures Corporation.

7. On February 10, 1944, Columbia Pictures Corporation, in consideration of the payment of \$750.00, granted the defendant Walter Pidgeon a license to produce one radio broadcast based upon the motion picture photoplay, and a copy of said license is attached to the stipulation of facts filed herein, and marked Exhibit B.

8. Defendant Walter Pidgeon entered into a contract with defendant Young & Rubicam, Inc., under the terms of which Pidgeon was employed to secure the necessary assistants—other than the guest star—and music, and to arrange for, produce and act in a radio play to be broadcast over the facilities and from the studio of defendant Columbia Broadcasting System, Inc. Young & Rubicam, Inc. acted for and on behalf of a corporation which sponsored the program and said corporation is not a defendant in this action. The program was broadcast on February 20, 1944, from the Hollywood Studios of Columbia Broadcasting System, Inc. over a national hookup comprising 131 stations. The duration of the program was one-half hour, and a full, true and correct transcription thereof is attached to the complaint and marked Exhibit 2. The radio play was not broadcast at any other time or over any other station.

9. The radio broadcast referred to in the foregoing paragraph was a sketch of the motion picture version of plaintiff's dramatic work.

Conclusions of Law

As Conclusions of Law from the foregoing Findings of Fact the court determines:

1. Plaintiff expressly granted the right to broadcast by radio a sketch of the motion picture version of his dramatic work, and such right was lawfully assigned to the defendants herein.
2. Defendants did not, by said radio broadcast, infringe the copyright of the plaintiff in the manner set forth in the [326] complaint, or otherwise, but on the contrary were expressly authorized and empowered by license from the plaintiff so to do, and plaintiff is entitled to take nothing by his complaint herein.

Let Judgment be entered accordingly.

Dated: Sept. 25, 1944.

Ben Harrison

U. S. District Judge

The foregoing Findings of Fact and Conclusions of Law are hereby approved as to form under Rule 7.

LOEWENTHAL & ELIAS

By Paul Loewenthal

Attorneys for Plaintiff. [327]

In the District Court of the United States  
Southern District of California  
Central Division  
No. 3527-BH

LAWRENCE HAZARD,

Plaintiff,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,  
a corporation, et al.,

Defendants.

### JUDGMENT

The above entitled action came on regularly for trial before the above entitled court on September 12, 1944, Honorable Ben Harrison Judge thereof, plaintiff appearing through his attorneys Messrs. Loewenthal & Elias and Paul Loewenthal, Esquire, and the defendants appearing by their attorneys, Messrs. Mitchell, Silberberg & Knupp and Guy Knupp, Esquire, and the court having duly considered the law and the evidence, and being fully advised herein, makes and files herein its Findings of Fact and Conclusions of Law.

Wherefore, by reason of the Findings of Fact and Conclusions of Law aforesaid, It Is Hereby Adjudged and Decreed that plaintiff take nothing by his complaint herein, and that defendants have and recover their costs herein incurred. Taxed at \$34.50.

Dated: Sept. 25, 1944.

Ben Harrison

U. S. District Judge

Entered 9/25/44, Civil Order Book No. 28, Pg.  
133 [328]

The foregoing Judgment is hereby approved as to form  
under Rule 7.

LOEWENTHAL & ELIAS  
By Paul Loewenthal  
Attorneys for Plaintiff [329]

---

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable, Benjamin Harrison, Judge of the  
above captioned court; and to the defendants above  
named and Messrs. Mitchell, Silberberg & Knupp,  
their attorneys:

You and Each of You Will Please Take Notice that  
Lawrence Hazard, the plaintiff in the above entitled ac-  
tion, hereby appeals to the United States Circuit Court  
of Appeals, for the Ninth Circuit, from the judgment  
herein made and entered in the said District Court of  
the United States, Southern District of California, Cen-  
tral Division, on the 25th day of September, 1944, in  
favor of the said defendants and against the said plaintiff,  
and from the whole of said judgment.

Dated: December 22, 1944.

LOEWENTHAL & ELIAS and  
J. ROBERT ARKUSH  
By J. Robert Arkush  
Attorneys for Plaintiff

[Endorsed]: Filed 12/22/44. [330]

[Title of District Court and Cause.]

### STIPULATION RE RECORD ON APPEAL

It Is Hereby Stipulated between the parties hereto, by and through their respective counsel, that the copies of the various documents, exhibits, records and instruments attached hereto are true and correct copies of all thereof, and that the same constitute a full, complete and true record of the entire proceedings had at the trial of the above entitled action.

It Is Further Stipulated that the same shall constitute the complete record upon appeal from the judgment made and entered in said action by the above entitled court against plaintiff and in favor of defendants therein.

Dated: January 4, 1945.

LOEWENTHAL & ELIAS and  
J. ROBERT ARKUSH

By Paul Loewenthal

Attorneys for Plaintiff

MITCHELL, SILBERBERG & KNUPP

By Guy Knupp

Attorneys for Defendants [331]

[Title of District Court and Cause.]

ORDER APPROVING RECORD ON APPEAL AND  
CERTIFYING SAME TO THE CIRCUIT  
COURT OF APPEALS

After examination of the foregoing record on appeal, and pursuant to the stipulation of the parties contained therein, it is hereby found that the foregoing is a true record and fully presents any questions that can be raised on appeal.

The said record is hereby approved and same is hereby certified to the Circuit Court of Appeals as the record on appeal.

Dated: January 12, 1945.

Ben Harrison

Ben Harrison

Judge of the above captioned court

[Endorsed]: Filed Jan. 12, 1945. [332]

[Title of District Court and Cause.]

## CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 332 inclusive contain the stipulated record on appeal and order approving same and certifying same to the Circuit Court of Appeals which constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.75 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 30 day of January, 1945.

[Seal]

EDMUND L. SMITH,

Clerk

By Theodore Hocke

Chief Deputy Clerk.

[Endorsed]: No. 10975. United States Circuit Court of Appeals for the Ninth Circuit. Lawrence Hazard, Appellant, vs. Columbia Broadcasting System, Inc., a Corporation; Walter Pidgeon; Loretta Young; Young & Rubicam, Inc., a Corporation; and Goodyear Tire & Rubber Co., Inc., a Corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California. Central Division.

Filed January 31, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 10975

In the Circuit Court of Appeals of the United States  
in and for the Ninth Circuit

LAWRENCE HAZARD,

Appellant,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a  
corporation; GOODYEAR TIRE & RUBBER CO.,  
INC., a corporation; WALTER PIDGEON; and  
YOUNG & RUBICAM, INC., a corporation,

Appellees.

STATEMENT OF POINTS ON WHICH  
APPELLANT RELIES ON APPEAL

The points on which appellant intends to rely on appeal  
are as follows:

I.

That under the contract dated March 25, 1933, be-  
tween appellant and the appellee Columbia Pictures Cor-  
poration of California, Ltd., appellant did not grant any  
license or right to broadcast by radio any complete play  
based upon the dramatic composition "A Man's Castle,"  
or to make any other radio broadcast thereof excepting  
upon the very limited and restricted conditions provided  
in the aforementioned contract, and the trial court erred  
in interpreting said contract to the contrary.

II.

The broadcasting activities carried on by appellees were carried on in violation of the aforementioned contract, and the trial court erred in refusing to so hold.

III.

The trial court erred in denying appellant the right to introduce in the trial court, as evidence in the case, Plaintiff's Exhibit No. 1 for Identification, which exhibit is a form or assignment of all rights used by the appellee Columbia Pictures Corporation of California, Ltd. where all rights are granted to said corporation; that the trial court's refusal to allow the introduction of the said document constituted prejudicial error to the appellant herein.

IV.

That No. IX of the Findings of Fact, to wit: "The radio broadcast referred to in the foregoing paragraph was a sketch of the motion picture version of plaintiff's dramatic work . . ." is not based on nor supported by any evidence, and the trial court erred in so finding.

V.

The trial court erred in its Conclusions of Law in stating that the defendant did not, by said radio broadcast, infringe the copyright of the plaintiff in the manner set forth in the complaint, or otherwise, but on the contrary were expressly authorized and empowered by license from the plaintiff so to do, and plaintiff is entitled to take nothing by his complaint herein.

As provided in Rule No. 19 of Rules, United States Circuit Court of Appeals, for the Ninth Circuit, the following portions of the record are necessary for the consideration of the foregoing statements: All of the original certified record, pages 1 to 332, inclusive, with the omission of Exhibit 1 to plaintiff's complaint, which is plaintiff's original dramatic composition (first version), which omitted portion covers pages 8 to 117 inclusive, of the original certified record.

Dated: January 30, 1945.

Respectfully submitted,

LOEWENTHAL & ELIAS and  
J. ROBERT ARKUSH

By Paul Loewenthal

Attorneys for Appellant

Received copy of the within Statement of Points on Which Appellant Relies on Appeal this 30th day of January, 1945.

Mitchell, Silberberg & Knupp

By Guy Knupp,

Attorneys for Appellees.

[Endorsed]: Filed Jan. 31, 1945. Paul P. O'Brien,  
Clerk.

No. 10975.

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

LAWRENCE HAZARD,

*Appellant,*

*vs.*

COLUMBIA BROADCASTING SYSTEM, INC., a corporation;  
WALTER PIDGEON; LORETTA YOUNG; YOUNG & RUBI-  
CAM INC., a corporation; and GOODYEAR TIRE & RUB-  
BER CO. INC., a corporation,

*Appellees.*

---

APPELLANT'S OPENING BRIEF.

---

LOEWENTHAL & ELIAS and  
J. ROBERT ARKUSH,

633 Roosevelt Building, Los Angeles 14,

*Attorneys for Appellant.*

**FILED**

MAY 21 1946

---

PAUL P. O'BRIEN,

Parker & Company, Law Firm, Los Angeles. Phone TR. 5206.

---



## TOPICAL INDEX.

	PAGE
Jurisdiction .....	1
Statement of case.....	2
Specification of errors.....	6
Summary of argument.....	7
Argument .....	8

### I.

Introduction to argument.....	8
A. Defendants' broadcasting activities were in violation of articles (1) and (3) of the license agreement.....	10
B. The general language of the contract, when considered in connection with articles (1) and (3) thereof, did not permit this broadcast.....	17

### II.

The trial court erred in denying appellant the right to intro- duce as evidence in the case Plaintiff's Exhibit 1 for iden- tification .....	23
--	----

## TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Branch v. Bekins Van & Storage Company, 106 Cal. App. 623, 290 Pac. 146.....	23
Gilde v. Schuster, 83 Cal. App. 537, 257 Pac. 121.....	24
Isenberg v. Salyer, 62 Cal. App. (2d) 938, 145 Pac. (2d) 691....	24
Jenny Lind Company v. Bower & Company, 11 Cal. 194.....	24
Lewis Publishing Company v. Henderson, 103 Cal. App. 425, 284 Pac. 713.....	24
Shelley v. Byers, 73 Cal. App. 44, 238 Pac. 177.....	24
 <b>STATUTES.</b>	
Civil Code, Sec. 1068.....	22
Civil Code, Sec. 1644.....	13
Code of Civil Procedure, Sec. 1654.....	22
Copyright Act of 1909, Sec. 11.....	2
United States Code, Title 17, Sec. 34.....	1
United States Code, Annotated, Title 28, Sec. 225, Subd. (a).....	2
 <b>TEXTBOOKS.</b>	
Webster's Dictionary .....	13, 15

No. 10975.

IN THE

# United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

---

LAWRENCE HAZARD,

*Appellant,*

*vs.*

COLUMBIA BROADCASTING SYSTEM, INC., a corporation;  
WALTER PIDGEON; LORETTA YOUNG; YOUNG & RUBI-  
CAM INC., a corporation; and GOODYEAR TIRE & RUB-  
BER CO. INC., a corporation,

*Appellees.*

---

## APPELLANT'S OPENING BRIEF.

---

### Jurisdiction.

Jurisdiction of the trial court was conferred by the copyright laws of the United States of America, and particularly by Title 17, U. S. C., Section 34. [Tr. p. 3.]

The final judgment of the District Court from which this appeal was taken was entered September 25, 1944. [Tr. p. 255.]

Notice of appeal was served and filed in the District Court on December 22, 1944. [Tr. p. 255.]

The complaint on file alleges, in paragraph VII thereof, that on or about May 28, 1932, plaintiff complied in all respects with the provisions of the Copyright Act of 1909,

as amended, and particularly with the provisions of Section 11 of said Act, and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said dramatic composition, and received from the registrar of copyrights a certificate of registration dated and identified: "May 28, 1932, Entry: Class D2, No. 16584." [Tr. p. 5.]

The allegations of the aforesaid paragraph VII of the complaint were admitted to be true by written stipulation of the parties. [Tr. p. 44 (par. 1 of stipulation).]

It was also stipulated that the record on this appeal constitutes a full, complete and true record of the entire proceedings had at the trial, and that all documents, records and instruments attached to the stipulation are true and correct copies thereof. [Tr. p. 256.] The trial court approved and certified said record to the Circuit Court of Appeals as the record on appeal. [Tr. p. 257.]

Jurisdiction to review the judgment of the court below is conferred by Title 28, Section 225, U. S. C. A., and particularly subdivision (a) thereof.

#### **Statement of Case.**

Lawrence Hazard, plaintiff in this action, who will also be referred to hereinafter from time to time as "appellant," created and wrote an original dramatic composition entitled "A Man's Castle."

Said dramatic composition contains a large amount of material wholly original with plaintiff. On or about May 28, 1932, in compliance with the Copyright Laws of the United States, plaintiff copyrighted this original work. Since May 28, 1932, plaintiff has been and still is the sole proprietor of all rights, and of all title and interest, in

the copyright of said dramatic composition, excepting such of said rights as he may have parted with under the terms of a license agreement in writing between him and Columbia Pictures Corporation of California, Ltd., dated the 25th day of March, 1933. [Tr. p. 36.]

Said license agreement was prepared by said Columbia Pictures Corporation of California, Ltd upon its own printed form. [Tr. pp. 44-45.]

Thereafter, Columbia Pictures Corporation of California, Ltd. produced a motion picture photoplay entitled "A Man's Castle" [Tr. p. 45], pursuant to the license given to it under said license agreement, and which was based upon plaintiff's original dramatic composition of the same name. The motion picture script from which the photoplay is made is set forth at length in the transcript, pages 47-223, inclusive.

Prior to February 12, 1944, Columbia Pictures Corporation of California, Ltd., a California corporation, was merged with Columbia Pictures Corporation under the name of "Columbia Pictures Corporation." [Tr. p. 45.]

On February 10, 1944, Columbia Pictures Corporation entered into an agreement in writing with defendant Walter Pidgeon [Tr. p. 45], a true and correct copy of which said agreement is set forth in the transcript, pages 224 to 226, inclusive. By the terms of said agreement, Columbia Pictures Corporation, among other things, granted the said Walter Pidgeon a license to make two radio broadcasts based upon said motion picture photoplay.

Walter Pidgeon had theretofore entered into a contract with defendant Young & Rubicam Inc., under the terms of which Walter Pidgeon was employed to secure the

necessary assistance—other than the guest star—and to arrange for, produce and act in a radio play to be broadcast over the facilities and from the studio of defendant Columbia Broadcasting Systems, Inc., Young & Rubicam Inc. acting for and on behalf of the corporation sponsoring the program. The program was broadcast on February 20, 1944, from the Hollywood studios of the Columbia Broadcasting System over a national hook-up comprising 131 stations. The duration of the program was one-half hour, and a full, true and correct script thereof is attached to the complaint [Tr. pp. 45-46], and marked Exhibit 2 thereof. [Tr. pp. 7-32.]

The introduction of the radio broadcast announced: "The star — Loretta Young — and the story—'A Man's Castle'—and your host, Walter Pidgeon. . . ." [Tr. p. 7.]

Upon thus being introduced, Walter Pidgeon then announced over the radio: ". . . The story is 'A Man's Castle' . . ." [Tr. p. 8.]

Plaintiff contends that the broadcast over the radio amounted to a violation of the license agreement and constituted an infringement of his copyright.

This action is for an injunction restraining said infringement and for damages claimed to have been sustained by plaintiff by reason thereof and for an accounting for all gains, profits and advantages derived by defendants from said infringement, and for other equitable relief and for plaintiff's costs and reasonable attorneys' fees.

By stipulation of the parties and by order of the trial court, no evidence was offered or introduced with respect

to the question of damages. In this connection, the trial court stated: ". . . if I hold for plaintiff, I will set down as early a date as possible to determine the damages." [Tr. p. 236.]

Judgment was given by the trial court against the plaintiff and in favor of defendants with costs. This appeal is taken from that judgment.

Although admitting the existence of certain limited rights of defendants to broadcast, it is plaintiff's position that the particular broadcast here involved exceeded those limited rights, and was in violation of the license agreement and hence constituted an infringement of his copyright.

As heretofore pointed out, the agreement was prepared by Columbia Pictures Corporation of California, Ltd. upon its own printed form [Tr. pp. 44-45] and hence is to be strictly construed against defendants, the rights of all of whom flow only from that license agreement.

The first two paragraphs of article (1) [Tr. pp. 36-37] and article (3) [Tr. p. 39], both of the license agreement, contain the only provisions embodied in the agreement directly relating to broadcasting rights.

The motion picture photoplay "A Man's Castle" was admittedly an adaptation of plaintiff's original dramatic composition. [Tr. p. 34.]

The radio version was admittedly based upon the same original dramatic work, but since the motion picture version was likewise based upon the original dramatic work, it necessarily follows also that the radio adaptation followed both the original dramatic work and the motion picture adaptation thereof. [Tr. pp. 34-35.]

### **Specification of Errors.**

(1) Under the license agreement dated March 25, 1933, appellant did not grant any license or right to broadcast by radio any complete play based upon a dramatic composition "A Man's Castle," or to make any other radio broadcast thereof, excepting upon the very limited and restricted conditions provided in said contract, and the trial court erred in interpreting said contract to the contrary.

(2) The broadcasting activities carried on by appellees were conducted in violation of the aforementioned contract, and the trial court erred in refusing to so hold.

(3) The trial court erred in denying appellant the right to introduce in the trial court, as evidence in the case, Plaintiff's Exhibit No. 1 for Identification, which appears at length in the transcript of record on appeal, pages 241 to 247, inclusive, thereof, which exhibit is a form of assignment of all rights used by appellee Columbia Pictures Corporation of California, Ltd. where all rights are granted to said corporation, including general radio broadcasting rights—not being limited to the narrow rights covered by the license agreement involved here. The trial court's refusal to allow the introduction of said document constitutes prejudicial error to the appellant.

(4) Finding IX of the Findings of Fact, to wit: "The radio broadcast referred to in the foregoing paragraph was a sketch of the motion picture version of plaintiff's dramatic work . . ." [Tr. p. 252] is not based on or

supported by any evidence, and the trial court erred in so finding.

(5) The trial court erred in its Conclusions of Law [Tr. p. 253; in stating: ". . . that the defendants did not by said radio broadcast infringe the copyright of the plaintiff in the manner set forth in the complaint, or otherwise, but on the contrary were expressly authorized and empowered by license from the plaintiff so to do, and plaintiff is entitled to take nothing by his complaint herein."

### **Summary of Argument.**

Defendants' broadcasting activities were in violation of the licenses granted under the license agreement dated March 25, 1933.

A. The extent and character of the broadcast exceeded the license granted under articles (1) and (3) of the agreement; and

B. The general language of the license agreement clearly shows that the agreement did not authorize the broadcasting of an entire play, but only permitted broadcasting of sketches of the motion picture version of appellant's original dramatic work.

### **II.**

The trial court erred in refusing to admit in evidence Plaintiff's Exhibit 1 for Identification.

## ARGUMENT

### I.

#### **Introduction to Argument.**

Although in some respects this action is similar to the ordinary plagiarism suit, it is to be particularly noted that there is one outstanding difference, to wit: that in the ordinary plagiarism action it is incumbent upon the plaintiff to prove that not only the infringing and infringed works were similar but also that the defendants had access to the infringed work and that they actually indulged in copying; whereas, in the instant case it is admitted [Tr. pp. 44-45] that the original work, the motion picture and the radio play all bore the same title, to wit: "A Man's Castle"; that the motion picture was in fact based upon plaintiff's original work by virtue of the terms of the license agreement, and that the radio play looked for its source to the same work, although it was made from the motion picture. [Tr. p. 224.]

Appellant's rights, then, are to be determined by a proper interpretation of the license agreement.

If the broadcast was in violation of the license agreement, the trial court's ruling must be reversed.

This is the theory upon which the case was tried, as is shown by the language of the court and that of Mr. Knupp, attorney for appellees, which appears at the bottom of page 229 and top of page 230 of the transcript, as follows:

"The Court: Gentlemen, let me ask a few questions, which perhaps will clarify this matter. Is there any dispute over this fact. That if there had been no contract in this case, that the radio adapta-

tion as you call it, would have been an infringement of the copyright of the original play?

Mr. Knupp: I don't think there is any question about that, if the Court please. I think that is shown clear enough by a comparison between the radio adaptation and the story.

The Court: That was my conclusion in reading the different scripts submitted to me.

Mr. Knupp: That is right.

The Court: Then it comes down to the real question here of an interpretation of the contract—isn't that the real issue in the case?

Mr. Loewenthal: That is right. We are agreed on that. . . ."

In other words, we have here but to refer to the language of the contract itself—and this phase of the problem which is presented to this court upon appeal is solely one of determining the proper interpretation of that contract, the license agreement of March 25, 1933.

For the purpose of this argument, the license agreement should be analyzed and considered in two separate aspects, to wit:

- A. The effect of the language contained in articles (1) and (3); and
- B. The effect of the general language contained in other portions of the contract;

and the arguments hereinafter presented will be directed to those two phases in the order named.

A. DEFENDANTS' BROADCASTING ACTIVITIES WERE IN VIOLATION OF ARTICLES (1) AND (3) OF THE LICENSE AGREEMENT.

The granting clauses of the contract are contained in the first two paragraphs of article (1) thereof [Tr. pp. 36-37], and read as follows:

"1. The Owner(s) hereby grant(s) sell(s) assign(s) and sets(s) over to the Purchaser, forever, *the entire motion picture rights*, including the silent and/or sound and/or talking and/or musical, (in all languages), *motion picture rights* (all such rights being hereinafter included and embraced in the expression '*motion picture rights*'), for the entire world, in and to a certain dramatic work entitled 'A MAN'S CASTLE' written by Lawrence Hazard (hereinafter called the 'Author(s)') the title and theme thereof, exclusively, together with all of the benefits of the copyrights in such work and of all remedies for enforcing such copyrights with respect to such *motion picture rights*.

The Owner(s) hereby grant(s) to the Purchaser the exclusive right to make *motion picture versions* and silent and/or sound and/or talking and/or musical *motion picture versions* of such work (*all such versions* being hereinafter included and embraced in the expression '*motion picture versions*'), to translate, adapt, arrange, change, transpose, add to and subtract from such work and the title thereof to such extent as the Purchaser may deem expedient, to use excerpts from such work for the title, sub-titles, text and dialogue of such *motion picture versions*, to publish, for the purpose of advertising and exploiting such *motion picture versions*, in such form as the Purchaser may deem advisable, including its publication

in newspapers, fan magazines and trade periodicals, a synopsis or story of such *motion picture versions*, not exceeding, however, ten thousand words in length, to use excerpts from such work in heralds, programs, booklets, posters, lobby displays, press books and all other mediums of advertising and publicity whatsoever, *to broadcast sketches of such motion picture versions*, to use parts of such work or of the theme thereof in conjunction with other work or works in the making of motion picture versions, and the exclusive unlimited and unrestricted right to produce, reproduce, distribute, exhibit and otherwise exploit and dispose of such *motion picture versions*, and to secure copyright and copyright registration therein in all countries of the world in Purchaser's name or otherwise." (Emphasis added.)

The contract then goes on, in the third paragraph of article (1) to appoint Columbia Pictures as the agent of the author, to enforce and protect "*such motion picture rights . . . ; and to prevent the infringement thereof . . . "*"

Article (3) of the contract [Tr. p. 39] then goes on to define what rights were intended to be covered in article (1) in the granting clause, and the language of that article (3) is as follows:

"3. *The motion picture rights herein granted and assigned to the Purchaser by the Owner(s) include the exclusive right to make and use disc records, sound on film, and any and all other mechanical contrivances or devices for the recordation of the sound and talking and musical and other audible portions of any such motion picture versions and for the reproduction and performance of all such sounds as*

part of or incidental to the exhibition thereof, and also include the exclusive right to project by television, radio, electricity or in any other manner any such motion picture versions, including the sound, talking, singing and other audible portions thereof, through space, for exhibition and performance at any and all places away from that wherein any such motion picture versions shall be exhibited and performed." (Emphasis added.)

By the provisions of the foregoing quoted portions of article (1) of the license agreement, the author granted the entire motion picture rights, and then state that all such rights are in effect thereafter in the contract to be referred to by the expression "motion picture rights." In the third paragraph of the same article, Columbia Pictures is given the right to enforce and protect "such motion picture rights." Article (3) permits the broadcasting of "*motion picture versions*" as one of the incidental rights covered by the expression "*motion picture rights*." In other words, the expression "*motion picture rights*" included in the granting clause is the broader and more comprehensive term, and describes the entire or whole of all of the rights granted; whereas, the expression "*motion picture version*" is the more narrow and more restricted term and describes only a part of said whole or entire rights. Therefore, since the right to broadcast under article (3) of the license agreement is limited to a broadcast of "*motion picture versions*" (a part only of the whole), it cannot be argued that such broadcasting privileges apply to all the "*motion picture rights*" but apply only to that part of the "whole" expressly referred to, that is, "*motion picture versions*."

We have been unable to find a satisfactory definition of the expression "*motion picture version*," nor does the contract itself throw much light upon the meaning of that expression.

*California Civil Code*, Section 1644, is pertinent here in aiding in the interpretation of this contract, and reads as follows:

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

There is nothing in the license agreement, nor was any evidence introduced by defendants at the trial, to indicate or prove that the expression "*motion picture versions*" had been used in the contract, or was known in the motion picture industry in a technical sense, or had a special meaning given to it by usage. Therefore, the court is bound to accept that expression in its ordinary or popular sense. In plaintiff's pre-trial brief, filed with the trial court prior to the trial of this action, we referred the trial court to the definition found in Webster's Dictionary, and we now cite a part of that definition, as follows: "3.—An account from a particular point of view, esp. as contrasted with another account, as, two versions of the same affair." The trial court, at the time of the decision in this case, accompanied the decision with a "memorandum opinion," wherein it is stated [Tr. p. 249]:

"In this case we have the author's story as represented by his script, while on the other hand we

have a version of the same affair as produced and developed by Columbia Pictures. It was this version that was broadcasted and it is my opinion the plaintiff granted the right to do so."

We submit here that what the trial court completely overlooked was the fact that it is physically impossible to broadcast a motion picture version. What in fact was broadcast, and the only thing that could possibly have been broadcast, was the radio version. What actually was done here was that a motion picture adaptation was made from plaintiff's original work. Thereafter Columbia Picture actually produced and exhibited a motion picture photoplay based upon that adaptation. Thereafter defendant Walter Pidgeon and the other defendants re-adapted plaintiff's original work, condensed it and thereafter produced it over the radio in a performance that lasted one-half hour. The writer of the radio script took the characters, plot and the continuity from the motion picture script and then condensed it and adapted it to be broadcast by radio facilities, which obviously are different from the facilities by which motion pictures are produced and exhibited.

The continuity, plot and characterizations in the radio adaptation, or "version," were substantially the same as the continuity, plot and characterizations of the motion picture adaptation, or "version," and the continuity, plot and characterizations of the motion picture adaptation, or "version," were substantially the same as the continuity, plot and characterizations in the original manuscript. It therefore follows that what was actually broadcast was primarily the continuity, plot and characterizations of the original work.

In commenting upon the definition of the word "version" in Webster's Dictionary, the trial court concluded that there were exactly *two* "versions" here involved. We urge, however, that the court erred in this conclusion, in that it should have found either (a) that there was but one "version," to wit: the original version, and that the motion picture and radio vehicles were but two separate adaptations of that version; or (b) that there were three versions, to wit: the original version, the motion picture version and the radio version.

If "version" is to be considered as synonymous with "continuity," "plot" and "characterizations," then clearly there was but one version, and that was not a "*motion picture version*" but rather the version set forth in plaintiff's original manuscript.

On the other hand, if the word "version" is to be considered as involving or embodying scenery, sound equipment, dialogue and physical facilities employed in the exhibition of the story, then, when we consider that it became necessary, because of the very difference in the nature of radio and motion picture exhibitions that totally different facilities be employed, it is obvious that what was broadcast over the air was not a "motion picture version" at all but was strictly and exclusively a "radio version."

Under any or all of the foregoing contingencies, the broadcasting of plaintiff's original play was not autho-

rized by either articles (1) or (3) of the license agreement.

Now, article (1) of the license agreement only permits broadcasting of "sketches" of the motion picture version. Of this there can be no argument. Reference to the radio script, however [Tr. pp. 7-35], clearly shows that a whole play was broadcast — not just a "sketch." Therefore, even if it be held that the broadcast involved here was a broadcast of the "motion picture version," nevertheless it was in violation of article (1), because it was not merely a "sketch" but was a complete play, commencing substantially with the sequence with which the motion picture script commenced, and including practically all the sequences involved in that script; and finally ending substantially with the same sequence as the motion picture script.

In conclusion, then, with respect to this phase of the argument, appellant contends:

- (1) That the broadcast violated the license granted under article (3), in that what was broadcast was not the "motion picture version" at all; and
- (2) That the broadcast violated the license granted under article (1), in that it was a broadcast of an entire play rather than a "sketch"; and that even if it be held that the broadcast was a "sketch," still under article (1), as well as under article (3), the scope of the broadcast went far beyond the "motion picture version."

B. THE GENERAL LANGUAGE OF THE CONTRACT, WHEN  
CONSIDERED IN CONNECTION WITH ARTICLES (1)  
AND (3) THEREOF, DID NOT PERMIT THIS BROAD-  
CAST.

Although the arguments heretofore made respecting articles (1) and (3) are of necessity also involved here, we shall not repeat those arguments, but merely ask that the court bear them in mind in connection with the following argument:

Article (2) sets forth the warranties of the author, plaintiff in this action, in respect to "the *motion picture rights* in such work . . ."; and

" . . . that the *motion picture rights* have in no way been sold . . .; that the reproduction and exhibition of such work in the form of *motion picture versions* will not in any way infringe upon any rights of any party whomsoever; that the Owner(s) (has) (have) done no act or thing that can in any way prevent or interfere with the full enjoyment by the Purchaser of the rights hereby acquired.

The Owner(s) agree(s) and guarantee(s) to defend, indemnify and hold the Purchaser harmless against any losses, damages, expenses or judgments which may be sustained or suffered by or secured against the Purchaser by reason of the use of the title of such work *for the title of any such motion picture versions*, or of any infringement of any copyright or common law rights or any *literary, dramatic musical or motion picture rights*, on account of any use which the Purchaser may make of such work *in the making of the motion picture versions thereof, the distribution, exhibition or other disposition of such motion picture versions, or the*

*exercise or attempted exercise of any of the rights hereby granted.*

The warranties contained in this article *apply only to the material used in such motion picture versions* taken from such work written by the Author(s) and do not in any way apply to any extraneous matter inserted by the Purchaser *in such motion picture versions.*" (Emphasis added.) [Tr. pp. 36-38.]

The court is bound to take notice of the minute and careful language used throughout the contract in describing the enumeration of rights which Columbia Pictures acquired thereunder, and it is absolutely inconceivable that the company would have failed to include general broadcasting rights by the use of concise and adequate language to that effect, if it had intended that the contract should cover such rights. In this connection, it is of importance to note that nowhere in the contract, either in article (1) or article (3) thereof, is there any independent right to broadcast, and that wherever reference is made to broadcasting rights, such reference is limited: in article (1) to *broadcasting sketches of such motion picture versions*; and in article (3) to *broadcast such motion picture versions.*

Compare this with the language in the printed form of contract used by Columbia Pictures Corporation of California, Ltd. as set forth in Plaintiff's Exhibit 1 for Identification [Tr. pp. 241-247] where the purchaser is given full right and title in the "work" for all purposes whatsoever,

". . . and including also under such grant sale and assignment, without in any way limiting or re-

stricting, the same, the entire literary, publication, novelization, dramatization, performing, mechanical reproduction radio and other broadcasting, television and silent, sound, talking and/or musical motion picture rights therein for all countries of the world and in all languages and any and all other rights of any character that may hereafter be invented, discovered or come into existence." [Tr. p. 242.]

Note further that the author warrants that he is the sole owner of ". . . all rights of every character in such work and has full right and authority to grant the rights hereby conveyed." [Tr. p. 244.]

From the foregoing quoted portions of Plaintiff's Exhibit 1 for Identification, it becomes clear that under their so-called "all rights" contract, where it is actually intended that Columbia Pictures shall acquire broad radio rights, concise and adequate language is embodied in their contract, so that there can be no misunderstanding about the scope of their licenses or privileges.

Incidentally, as will be more fully argued hereafter in this brief, because of the contrast in the two forms of contract and as an aid in interpreting the license agreement, the trial court should have admitted Plaintiff's Exhibit 1 for Identification in evidence.

The transcript does not contain a copy of plaintiff's original manuscript but it does contain copies of the motion picture and radio scripts. The failure to include the manuscript of the original work was not due in any sense to oversight. The omission resulted from the fact that since, admittedly, the motion picture script was based upon the manuscript of the original work, and since the radio script was based upon the motion picture

script, no useful purpose would have been served in cluttering the record on appeal unnecessarily with voluminous copy.

At the expense of being repetitious, it is again urged here that it would have been an exceedingly simple matter for the drafters of this contract to include the general right of broadcast if the parties to the contract had had the slightest intention that those rights were to be included in the grant.

It is also enlightening to note that in the warranty clause contained in article (2), the author merely warranted that he was the owner of "*the motion picture rights*," and that he had authority to "*grant the rights hereby conveyed*." In this same connection, and included within the same article of the contract, the author warrants "*that the motion picture rights*" had not been previously disposed of; and again, in the same article, guaranteed the purchaser against loss or damage which may be sustained by the latter by reason of its use of the title in "*any such motion picture versions*," or of any infringement on account of any use which the purchaser may make in "*the making of the motion picture version thereof, the distribution, exhibition or other disposition of such motion picture versions*." And again, in the same article of the contract, the following language appears: "The warranties contained in this article apply only to the material used in such motion picture versions . . ."

A cogent question which might be asked here is: "If the parties intended that radio rights pass under the contract, then why, in the warranty clauses, was there not a war-

ranty exacted from the author with respect to radio rights?" or, putting the question in another way, "Why is the warranty limited only to motion picture rights?" The best answer to these questions is that it was never intended that the radio rights should pass, for certainly if such was the intention of the parties, a warranty would have been exacted from the author, giving the purchaser the same protection with respect to radio rights as it had with respect to motion picture rights.

It is entirely possible that the drafters of this printed form of contract may have anticipated that with the advance and development of the science of radio, a time might come when the motion picture theatre as it is now known might become an institution of the past, and that motion pictures, by which is intended *the actual film thereof*, would be shown to the public by broadcasting, through television or otherwise, but over the air, what the public now sees and hears while occupying a seat in a theatre. Or the drafters of the contract may have anticipated that motion pictures would be thrown upon a screen in what may be termed here a "master studio or theatre," and from such master studio or theatre be broadcast to other theatres throughout the country, by radio or television. The anticipation of such conditions is not too far-fetched, and these, in the opinion of the writer, are the reasons for which the language with respect to broadcasting by radio and television is included within the contract.

We submit that, by reason of the general language running throughout the entire contract, it is obvious that the parties did not intend to license general broadcasting rights thereunder, and that the right to explain the limitations of the grant by reference to the general language is permitted under Section 1068 of the Civil Code of the State of California:

“If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction.”

In our “Statement of Case” previously set out in this brief, we referred the court to the fact that the license agreement was prepared by Columbia Pictures Corporation of California, Ltd upon its own printed form. [Tr. pp. 44-45.]

If, therefore, any ambiguity exists in this contract, as we insist that it does, then the contract should be interpreted most strongly against appellees, for under the provisions of Section 1654 of the Code of Civil Procedure of the State of California, it is provided that “In cases of uncertainty . . . the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist . . .”

For the reasons above assigned, appellant urges that not only did articles (1) and (3) of the contract prohibit the licensing of this particular broadcast, but its general language did likewise.

II.

**The Trial Court Erred in Denying Appellant the Right to Introduce as Evidence in the Case Plaintiff's Exhibit 1 for Identification.**

It was stipulated [Tr. pp. 227-228] that the contract so offered in evidence was one from time to time used by Columbia Pictures Corporation purporting to assign *all rights* when it was Columbia Pictures Corporation's intention to take an assignment of all rights to a dramatic composition. Counsel for defendants objected to the introduction of this evidence upon the ground that "it is entirely incompetent in connection with this case . . ." [Tr. p. 228.]

"The Court: I don't think that is important.  
Mark it for identification."

Regardless of the fact that the court's ruling was a rather informal one, it nevertheless follows that the document was not permitted to be introduced in evidence and plaintiff was, therefore, deprived of its evidentiary value.

It now must be obvious that the interpretation of the license agreement with respect to the meaning of the expression "*motion picture version*" is not so clear as to prohibit the use of collateral matter as an aid to interpretation, if in fact such collateral matter would be of value or assistance in arriving at a proper interpretation.

The law is clear that where the terms of a contract are ambiguous parol evidence is admissible to explain the uncertainty.

*Branch v. Bekins Van & Storage Company*, 106 Cal. App. 623, 290 Pac. 146.

In the case of *Lewis Publishing Company v. Henderson*, 103 Cal. App. 425, 284 Pac. 713, the court allowed extrinsic evidence to aid the interpretation of the language used in the contract. In this case defendants' testatrix agreed to buy a set of books containing portraits of herself and her husband reproduced from engraved steel plates. The evidence showed that different kinds of plates of different values were then in use. Inasmuch as the written memorandum did not specify the kind to be used, extrinsic evidence was admissible to explain the apparently ambiguity and to show what the parties intended thereby. In the same manner, we believe, the trial court should have allowed in evidence Plaintiff's Exhibit 1 for Identification, which showed the form of contract used by the defendants when they intended to obtain broadcasting rights. Certainly the contract used is ambiguous with respect to the meaning of "*motion picture version,*" and the offered contract throws light on this question.

It has been held that even where an ambiguity in an instrument of writing consists in the use of a word which has a settled meaning, but at the same time consistently admits of two interpretations, according to the subject matter in the contemplation of the contracting parties, that, even there, parol or extrinsic evidence is admissible to explain the contract.

*Jenny Lind Company v. Bower & Company*, 11 Cal. 194;

*Shelley v. Byers*, 73 Cal. App. 44, 238 Pac. 177;

*Gilde v. Schuster*, 83 Cal. App. 537, 257 Pac. 121;

*Isenberg v. Salyer*, 62 Cal. App. (2d) 938, 145 Pac. (2d) 691.

Had Plaintiff's Exhibit 1 for Identification been received in evidence, the trial court would have had before it a printed form of contract which was admittedly used and employed by defendant Columbia Pictures Corporation of California, Ltd. where it sought to acquire all rights from an author, including general broadcasting rights.

As pointed out in an earlier part of this brief, in article I, subdivision B., we called the court's attention to the contrast in the language used in the two contracts, to wit: the license agreement and Plaintiff's Exhibit 1 for Identification. We shall not repeat that argument here and shall add only at this point that we know of no better means by which the court could have ascertained the intent of the parties, with respect to the interpretation of the disputed phrases, than by actually seeing the language employed in a printed form of contract, prepared by the same parties, where they really intended to acquire all of the author's rights, including broad radio rights.

We submit that Plaintiff's Exhibit 1 for Identification was of extreme evidentiary value to appellant, plaintiff in the trial court, in establishing his interpretation of the license agreement; and appellant contends that Plaintiff's Exhibit 1 for Identification should have been admitted in evidence by the trial court, and the court's refusal to admit the same constituted prejudicial error and is cause for reversal of the trial court's judgment.

It is submitted, therefore, in conclusion, that this court in view of the foregoing arguments, and the state of the record presented on this appeal, should reverse the judgment of the trial court, should order judgment to be entered in favor of appellant for his costs, and should remand the cause to the trial court for the sole question of determining the issue of damages.

Respectfully submitted,

LOEWENTHAL & ELIAS and  
J. ROBERT ARKUSH,

By J. ROBERT ARKUSH,

*Attorneys for Appellant.*

Dated May 18, 1945.

No. 10975.

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

LAWRENCE HAZARD,

*Appellant,*

*vs.*

COLUMBIA BROADCASTING SYSTEM, INC., a corporation;  
WALTER PIDGEON; LORETTA YOUNG; YOUNG & RUBI-  
CAM, INC., a corporation; and GOODYEAR TIRE & RUB-  
BER CO., INC., a corporation,

*Appellees.*

---

APPELLEES' REPLY BRIEF.

---

MITCHELL, SILBERBERG & KNUPP and  
GUY KNUPP,  
603 Roosevelt Building, Los Angeles 14,  
*Attorneys for Appellees.*

FILED

JUN 18 1945



## TOPICAL INDEX.

	<b>PAGE</b>
Statement of facts.....	1
Assignment of errors.....	4
Argument .....	4

### I.

The grant and bill of sale executed by appellant to Columbia Pictures Corporation, dated March 25, 1933, authorized the radio broadcast upon which appellant relies as an infringement of his copyright.....	4
--	---

### II.

The trial court did not err in denying appellant the right to introduce as evidence in the case Plaintiff's Exhibit 1 for identification .....	10
--	----



No. 10975.

IN THE

**United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT**

---

LAWRENCE HAZARD,

*Appellant,*

*vs.*

COLUMBIA BROADCASTING SYSTEM, INC., a corporation;  
WALTER PIDGEON; LORETTA YOUNG; YOUNG & RUBI-  
CAM, INC., a corporation; and GOODYEAR TIRE & RUB-  
BER CO., INC., a corporation,

*Appellees.*

---

**APPELLEES' REPLY BRIEF.**

---

**Statement of Facts.**

Plaintiff and appellant is a writer who sometime prior to May 28, 1932, wrote an original dramatic composition entitled "A Man's Castle." This composition he copyrighted under date of May 28, 1932.

On March 25, 1933, appellant granted, sold, assigned and set over to Columbia Pictures Corporation certain rights in and to said dramatic work, and the instrument of conveyance and assignment is set forth at length in the Transcript of the Record [pp. 36-41].

Thereafter Columbia Pictures Corporation granted to the appellee, Walter Pidgeon, a license "to produce one (1) radio broadcast based upon your motion picture photo-

play entitled "Man's Castle" on the Goodyear program which I am producing on February 20, 1944." [Tr. p. 224.]

The complete broadcast so produced on February 20, 1944, is set forth in the Transcript [p. 7].

Appellant now contends that the broadcast constituted an infringement of appellant's copyright of the dramatic work entitled "A man's Castle," and appellees answer is that they were authorized to make such broadcast under their license from Columbia Pictures Corporation, and that Columbia Pictures Corporation in turn was authorized to execute such license by virtue of the bill of sale and assignment executed by appellant.

Two other facts are worthy of mention:

First, the radio broadcast is based upon the motion picture version of appellant's dramatic work rather than upon the work itself. This fact is expressly found by the court [Findings, par. 9, Tr. p. 252] in the following language:

"9. The radio broadcast referred to in the foregoing paragraph was a sketch of the motion picture version of plaintiff's dramatic work."

This finding is fully supported by the record, it appearing therefrom [Tr. p. 229] that upon the hearing the parties stipulated as follows:

"That the radio adaptation which was broadcast by the defendant Pidgeon, was written by one Charles Tazewell, and that Tazewell, if called as a witness in this case, would testify that he wrote the radio adaptation entirely from the screen play, that is to say, the motion picture scenario, and the dialogue, and that he did not have before him and had no access to the plaintiff's original dramatic composition."

Indeed, appellant himself says:

"The transcript does not contain a copy of plaintiff's original manuscript but it does contain copies of the motion picture and radio scripts. The failure to include the manuscript of the original work was not due in any sense to oversight. The omission resulted from the fact that since, admittedly, the motion picture script was based upon the manuscript of the original work, and since the radio script was based upon the motion picture script, no useful purpose would have been served in cluttering the record on appeal unnecessarily with voluminous copy." (Appellant's Op. Br., pp. 19-20.)

The important thing, for reasons hereinafter indicated, is that in interpreting the language of the grant or bill of sale it must be assumed to be a fact that the radio script is based upon the motion picture scenario, and that in preparing such radio script no use whatever was made of appellant's dramatic work.

Second, the radio broadcast makes use of only a very small part of the screenplay or scenario. It is, in fact, a mere outline or synopsis produced in dialogue from the story told by the motion picture. It is in fact what we believe to be a *sketch* of the motion picture scenario. The entire radio broadcast lasted but thirty minutes. It is set forth in full in the Transcript at pages 7 to 32, inclusive. On the other hand, the portrayal upon the screen of the motion picture scenario occupied the best part of two hours, and is to be found at pages 47 to 223, inclusive, of the Transcript. The mere difference in length of the radio broadcast and the motion picture scenario establishes conclusively that the former is but a small part of the latter. This again is important in construing the language used in the instrument of grant or assignment.

### **Assignment of Errors.**

While appellant specifies the errors complained of under five separate headings, there are in fact only two grounds which he urges as a basis of reversal.

First: The trial court erred in holding that the radio broadcast of February 20, 1944, was a right granted under the grant and bill of sale executed by the plaintiff and appellant to Columbia Pictures Corporation.

Second: The court erred in refusing to admit in evidence Plaintiff's Exhibit 1 for identification.

### **ARGUMENT.**

#### I.

##### **The Grant and Bill of Sale Executed by Appellant to Columbia Pictures Corporation, Dated March 25, 1933, Authorized the Radio Broadcast Upon Which Appellant Relies As an Infringement of His Copyright.**

Basically, appellant's position is that the radio broadcast constituted an infringement of the copyright of plaintiff's dramatic composition. This infringement, appellant contends, results from the fact that the granting clause of the instrument, under which Columbia Pictures Corporation acquired from appellant certain rights in the dramatic composition, is not sufficiently broad to include the radio broadcast.

"this phase of the problem which is presented to this court upon appeal is solely one of determining the proper interpretation of that contract, the license agreement of March 25, 1933." (Appellant's Br. p. 9.)

In determining whether the defendants exceeded the rights given them by the contract it must, however, be kept in mind that as found by the court, and established by the evidence, the radio broadcast is based upon the motion picture version of appellant's dramatic work rather than upon the work itself, and secondly, that a comparison of the radio broadcast with the motion picture scenario clearly shows that the former is only an outline or sketch of the latter. The language of the grant is, it seems to us, too certain and definite to leave any room for construction or interpretation.

Appellant gave to Columbia Pictures Corporation certain rights set forth in paragraphs 1 and 3 of the bill of sale.

Thus, in paragraph 1, appellant grants, sells, assigns and sets over to Columbia Pictures Corporation the entire motion picture rights in and to the dramatic work, together with all of the benefits of the copyrights of such work, and of all remedies for enforcing such copyrights with respect to such motion picture rights. Then the "Owner" (appellant here) in paragraph 1 proceeds to grant *seriatim* to Columbia Pictures Corporation (1) the exclusive right to make motion picture versions, etc.; (2) to translate, adapt, arrange, change, transpose, add to and subtract from such work and the title thereof to such extent as to the purchaser may deem expedient; (3) to use excerpts from such work for the title, sub-titles, text and dialogue of such motion picture versions; (4) to publish, for the purpose of advertising and exploiting such motion picture versions, in such form as the purchaser may deem advisable, including its publication in newspapers, fan magazines and trade periodicals, a synopsis or story of

such motion picture versions, not exceeding ten thousand words in length; (5) to use excerpts from such work in heralds, programs, booklets, posters, lobby displays, press books and all other mediums of advertising and publicity whatsoever; (6) *to broadcast sketches of such motion picture versions;* (7) to use parts of such work or the theme thereof in conjunction with other work or works in the making of motion picture versions; (8) the exclusive, unlimited and unrestricted right to produce, reproduce, distribute, exhibit and otherwise exploit and dispose of such motion picture versions; (9) to secure copyright and copyright registration therein in all countries of the world in the purchaser's name or otherwise. [Tr. pp. 36-37.]

A reading of this paragraph of the bill of sale indicates that these rights are several and distinct, and in no respect dependent one upon the other. The context of the granting clause in nowise subordinates the right "to broadcast sketches of such motion picture versions" to the right to make motion picture versions, and it cannot be logically contended that there is less doubt about the right of the grantee to broadcast sketches than there is of the right to make motion picture versions. The value of this particular right to Columbia Pictures Corporation arises not only because of the fact that a sale of this right could be had, as in this case for \$750.00, but because the assignee of the right agrees "In all advance radio announcements and immediately preceding the presentation of the broadcast of my radio adaptation of said motion picture version, I agree to announce the title of said motion picture version and the fact that it is a Columbia Picture Corporation production." [Tr. p. 225.]

It is the contention of the appellees that what has been done by them is fully justified by the grant of the right to broadcast sketches of the motion picture versions of the dramatic composition. Their right does not rest on that provision of the bill of sale alone, however, for in paragraph 3 the motion picture rights as granted and assigned in the instrument are described as including "the exclusive right to make and use disc records, sound on film, and any and all other mechanical contrivances or devices for the recordation of the sound and talking and musical and other audible portions of any such motion picture versions and for the reproduction and performance of all such sounds as part of or incidental to the exhibition thereof, and also include the exclusive right to project by television, radio, electricity or in any other manner any such motion picture versions, including the sound, talking, singing and other audible portions thereof, through space, for exhibition and performance at any and all places away from that wherein any such motion picture versions shall be exhibited and performed." [Tr. p. 39.]

Appellant finds difficulty in construing the phrase "motion picture version," and argues that in the final analysis what was actually broadcast was appellant's original play as adapted for use in broadcasting. We think that the meaning of the phrase is plain. Appellant wrote a stage play. That was the stage version of his dramatic composition. He gave Columbia Pictures Corporation the motion picture rights in his stage play, and additional rights in the motion picture version of the stage play. Columbia Pictures Corporation prepared a scenario or screenplay which differed in vital parts and substantial respects from the stage version. This would have been immediatey apparent had appellant included in the record a copy of the

appellant's original work. This was the motion picture version, and in view of the stipulation of the parties hereinabove set forth, and of the findings of the court, it is not now open to question that the broadcast was based upon the motion picture version.

The argument of appellant proves too much. He contends that there was either "one version, to-wit, the original version, and that the motion picture and radio vehicles were but two separate adaptations of that version; or there were three versions, to-wit, the original version, the motion picture version and the radio version." (Appellant's Br. p. 15.) This argument completely overlooks the fact that the contract between the parties provided for the right to broadcast a sketch of the motion picture version, and there can be no possibility that the parties had anything in mind other than the version of the dramatic composition as exemplified in the motion picture as distinguished from the version of the dramatic composition as set forth in the stage play.

Appellant nowhere indicates what he believes to have been the intention of the parties in the use of the phrase "motion picture version." He contents himself with the assertion that there was no such version. But the motion picture version as such could not be broadcast. It would have to be adapted, both as to content and length, to the radio program on which it was to be broadcast. The right to broadcast a sketch of the motion picture version therefore necessarily implies a right to take the motion picture scenario dialogue and continuity and to adapt it for use in broadcasting. Hence it is clear that a sketch of the motion picture version is the motion picture version adapted to the particular broadcast for which it was in-

tended. In other words, when appellant granted to Columbia Pictures Corporation the right to broadcast a sketch of the motion picture version, and when Columbia Pictures Corporation granted to appellees the right "to condense, modify, and adapt the abovesaid motion picture version in such manner as to conform to the requirements and needs of radio broadcasting" [Tr. pp. 224-225] the identical right was conveyed in each instance.

Finally appellant asserts in this part of his argument that reference to the radio script shows that the whole play was broadcast, not just a sketch. A comparison, however, reveals that what was broadcast over the radio, including all of the advertising and other announcements, occupies but twenty-five pages of the Transcript [pages 7 to 32, inclusive], while the scenario and dialogue continuity of the motion picture version occupies one hundred and seventy-six pages of the Transcript [pages 47 to 223, inclusive].

The second part of appellant's argument relative to the proper construction of the contract is stated in his language as follows: "The general language of the contract, when considered in connection with articles 1 and 3 thereof, did not permit this broadcast." To support this premise, appellant refers to article 2, which sets forth the warranties of the author. He asserts that these warranties do not relate to any broadcasting or other radio rights, and he asks why, if it was intended that such rights should pass to Columbia Pictures Corporation, the warranty was not sufficiently extensive to cover such rights. The best and simplest answer to this argument is that if, as we have argued heretofore, what was done by the appellees was to broadcast a sketch of the motion picture version,

the appellant's warranty includes any loss, damage or other injury resulting to the appellees therefrom. Thus the specific language of the warranty is this: "The Owner agrees and guarantees to defend, indemnify and hold the Purchaser harmless against any losses, damages, expenses or judgments which may be sustained or suffered by or secured against the Purchaser by reason of . . . the exercise or attempted exercise of any of the rights hereby granted." [Tr. p. 38.] It is the position of the appellees that one of the rights granted is that of broadcasting sketches of the motion picture version, and accordingly the warranty extends to that right. No further answer to appellant's contention in this respect seems necessary.

## II.

### **The Trial Court Did Not Err in Denying Appellant the Right to Introduce As Evidence in the Case Plaintiff's Exhibit 1 for Identification.**

The exhibit referred to was a printed form, in blank, unexecuted, whereby some undesignated person purports to grant to Columbia Pictures Corporation certain rights in and to an undesignated property referred to as "the work." [Tr. p. 241.] This form was offered as evidence, with the statement by counsel for appellant that it is a printed form of contract which at one time or another was used by Columbia Broadcasting System (Columbia Pictures Corporation). [Tr. p. 228.] There was nothing to identify this contract, or the time of its use, whether before or subsequent to the date when appellant executed the bill of sale involved in this controversy. The fact that Columbia Pictures Corporation may at some time or another have made use of a different form of con-

tract of which, so far as the record shows, appellant had no knowledge, is so patently incompetent and immaterial as to require no argument. The form may have been used at a date either prior or subsequent to, the date of the execution of the contract by appellant; it may have been used in conjunction with the same form of contract as that used in the deal with appellant; or it may have been used in acquiring different or additional rights. In any event, it could be of no possible aid to the court in the determination of the question before it.

It is respectfully submitted that the conclusion arrived at by the trial court is correct, and that the judgment entered therein should be affirmed.

MITCHELL, SILBERBERG & KNUPP and  
GUY KNUPP,

*Attorneys for Appellees.*



No. 10975

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

LAWRENCE HAZARD,

*Appellant,*

*vs.*

COLUMBIA BROADCASTING SYSTEM, INC., a corporation;  
WALTER PIDGEON; LORETTA YOUNG; YOUNG &  
RUBICAM, INC., a corporation; and GOODYEAR TIRE  
& RUBBER CO., INC., a corporation,

*Appellees.*

---

APPELLANT'S REPLY BRIEF.

---

LOEWENTHAL & ELIAS and  
J. ROBERT ARKUSH,  
633 Roosevelt Building, Los Angeles 14,  
*Attorneys for Appellant.*

FILED

JUN 28 1945

~~PAUL P. O'BRIEN,~~  
Parker & Company, Law Printers, Los Angeles. Phone TK 5206.  
~~CLERK~~



## TOPICAL INDEX.

	PAGE
Appellant's reply to appellees' statement of facts.....	1
Appellant's reply to section in appellees' brief entitled "Assignment of Errors".....	4
Appellant's reply to paragraph 1 of appellees' brief entitled "Argument" .....	4
Appellant's reply to section in appellees' brief entitled "The trial court did not err in denying appellant the right to introduce as evidence in the case Plaintiff's Exhibit 1 for identification"....	13



No. 10975  
BEFORE THE

# United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

---

LAWRENCE HAZARD,

*Appellant,*

*vs.*

COLUMBIA BROADCASTING SYSTEM, INC., a corporation;  
WALTER PIDGEON; LORETTA YOUNG; YOUNG &  
RUBICAM, INC., a corporation; and GOODYEAR TIRE  
& RUBBER CO., INC., a corporation,

*Appellees.*

---

## APPELLANT'S REPLY BRIEF.

---

### Appellant's Reply to Appellees' Statement of Facts.

The section in appellees' reply brief entitled "Statement of Facts" is neither entirely accurate nor is it strictly speaking a "Statement of Facts," but is rather partially a statement of facts and partially argument. The following statement appears upon page 2 of appellees' brief:

"Two other facts are worthy of mention:

First, the radio broadcast is based upon the motion picture version of appellant's dramatic work rather than upon the work itself. This fact is expressly found by the court [Finding, par. 9, Tr. p. 252] in the following language:

'9. The radio broadcast referred to in the foregoing paragraph was a sketch of the motion picture version of plaintiff's dramatic work.'

This finding is fully supported by the record . . ."

Appellant denies that the radio broadcast is based upon the motion picture version of appellant's dramatic work, rather than the work itself, and insists here that appellees' statement to the contrary is argumentative and is not a true statement of fact. It is contended here that this is one of the important issues to be determined by this appellate court.

It is true that the trial court made the finding of fact cited above, but appellant asserts here that it is not a fact, as stated by appellees, that said finding is fully supported by the record. This, again, is but an argumentative move on the part of appellees, rather than a statement of fact, and is likewise one of the important issues to be determined by this appellate court.

On page 3 of appellees' brief, the following language appears:

"The important thing, for reasons hereinafter indicated, is that in interpreting the language of the grant or bill of sale it must be assumed to be a fact that the radio script is based upon the motion picture scenario, and that in preparing such radio script no use whatever was made of appellant's dramatic work."

It is true that the writer of the radio script, at the time that he was actually writing that script, had before him the motion picture script and not the original dramatic script. The common source, however, was the dramatic script. That is stipulated and agreed to both in the pleadings and the evidence. But it is not to be assumed, as

appellees have implied, that the radio script was not based upon appellees' original dramatic work. The radio script was in fact based upon the original dramatic work of appellant.

The last paragraph on page 3 of appellees' brief is argumentative and is not a statement of fact, excepting in a few minor, inaccurate respects. For instance, it is not a fact that the radio broadcast makes use of only a very small part of the screen play or scenario. Nor is it a fact that the radio broadcast is a mere outline or synopsis produced in dialogue from the story told by the motion picture. It is not in fact a sketch of the motion picture scenario. The only accurate statement of fact in this paragraph is as follows:

“. . . It is set forth in full in the Transcript at pages 7 to 32, inclusive. On the other hand, the portrayal upon the screen of the motion picture scenario occupied the best part of two hours, and is to be found at pages 47 to 223, inclusive, of the Transcript . . .”

Appellant strenuously contends, however, that the following statement appearing in this paragraph is entirely inaccurate and misleading:

“. . . The mere difference in length of the radio broadcast and the motion picture scenario establishes conclusively that the former is but a small part of the latter . . .”

Hereinafter in this brief appellant will present his arguments respecting the foregoing comments.

### **Appellant's Reply to Section in Appellees' Brief Entitled "Assignment of Errors."**

Appellees state that in appellant's opening brief appellant has specified errors under five separate headings, but allege that there are in fact only two grounds urged upon appeal. It is admitted that in appellant's opening brief there are five separately numbered specifications of error. An examination of appellant's opening brief, however, will disclose that none of the errors specified have been abandoned upon this appeal. Appellant's reply brief, pages 8 to 22, inclusive, is devoted to the arguments directed to specifications of error numbered 1, 2, 4 and 5. Appellant's reply brief, pages 23 to 26, inclusive, is devoted to the arguments directed to specification of error number 3.

Appellees' statement that there are in fact only two grounds upon which appellant urges as a basis for reversal is misleading and inaccurate.

### **Appellant's Reply to Paragraph 1 of Appellees' Brief Entitled "Argument."**

Appellees state on page 5 of their brief:

"In determining whether the defendants exceeded the rights given them by the contract it must, however, be kept in mind that as found by the court, and established by the evidence, the radio broadcast is based upon the motion picture version of appellant's dramatic work rather than upon the work itself, and secondly, that a comparison of the radio broadcast with the motion picture scenario clearly shows that the former is only an outline or sketch of the latter. The language of the grant is, it seems to us, too certain and definite to leave any room for construction or interpretation."

For the reasons set forth in appellant's opening brief, as well as the reasons which will be hereafter presented to this court, it is insisted that the trial court's finding that the radio broadcast is based upon the motion picture version of appellant's dramatic work, rather than upon the work itself, is not supported by the evidence; and there is no reason why this court should assume, as appellees have done, that such a finding is supported by the evidence. Although it is conceded that if there is a conflict in the evidence, the trial court's finding of fact will not be disturbed on appeal, nevertheless in this case it is insisted that there is no conflict in evidence, or at least whatever evidence there is upon the subject conclusively points to the fact that this finding is not supported by the evidence. There is no parole evidence involved in this case. The evidence which is presented to this court on appeal consists primarily of the two manuscripts and the license agreement, whereby appellant licensed appellee Columbia Pictures Corporation to exploit his original dramatic work for certain limited purposes. Those manuscripts and that agreement are before this court and if upon those documents this court concludes that the radio broadcast here complained of violated the license passing under the agreement, then this court can and should hold that the trial court's finding last referred to is not supported by the evidence in the case, and upon that ground alone the judgment should be reversed.

Next, on page 5 of their brief, appellees, in referring to paragraph 1 of the agreement, make the statement that said paragraph 1 grants "seriatim" certain rights to Columbia Pictures and then proceed to designate each of said grants by numbers, which they have arbitrarily assigned, but which numbers do not appear in the contract itself.

Appellees assume throughout their entire brief that each of the elements of paragraph 1 of the agreement to which they have arbitrarily assigned numbers are in fact separate grants. It is appellant's position that these grants were not intended to be separate and independent of each other but that they all refer to privileges licensed under the agreement which are incidental to and only to be exercised in connection with the basic and primary right of the production, distribution, performance and exhibition of the motion picture.

Appellees' own argument, appearing at the bottom of page 6 of their brief, is as persuasively in favor of appellant's position as any argument which could possibly have been presented upon the subject. In that connection, appellees state:

“The value of this particular right to Columbia Pictures Corporation arises not only because of the fact that a sale of this right could be had, as in this case for \$750.00, but because the assignee of the right agrees '*In all advance radio announcements and immediately preceding the presentation of the broadcast of my radio adaptation of said motion picture version, I agree to announce the title of said motion picture version and the fact that it is a Columbia Picture Corporation production.*'”

In that statement lies the gist of appellant's position. From that statement, appellees obviously intended to imply that they were interested in obtaining advertising and publicity for the motion picture—so much so that before they would permit any broadcast, they insisted that the public be informed over the air that this was a radio adaptation of a motion picture by the same name, which was produced by Columbia Pictures Corporation. That, in appell-

lant's opinion, is all that the limited grant in paragraph 1 permitted, that is to say, that a sketch or a scene, or an episode, from the motion picture might be broadcast over the air, for the purpose of exploiting and advertising the motion picture itself. This is far from permitting general broadcasting of the entire play, and we again insist here that what was broadcast was not a sketch of the motion picture version, or of anything else, but was a broadcast of a complete play from beginning to end, sequence after sequence—either of the original dramatic composition or of the motion picture play—and it makes little or no difference which was used, since it was a whole play and not a sketch which was broadcast.

Appellees on page 8 of their brief challenge appellant's statement contained in his opening brief that there were three versions, not merely two. Appellees have assigned no logical reasons for their challenge in that respect. However, appellant's proposition may be stated in another manner. Without repeating the arguments contained in appellant's opening brief, it is urged that it must be patent and obvious that this was primarily a motion picture contract, not a radio contract. It is equally patent and obvious that Columbia Pictures intended to acquire, and that appellant intended to grant, full and complete rights to the production, creation, distribution, performance, exhibition and general exploitation of a *motion picture based upon appellant's original work*. Now, at the time when the contract was executed, in the year 1933, the only medium by which a motion picture could be commercially and profitably exhibited to an audience was by means of the motion picture theatre with the use of the screen upon which visualization was projected from the negative upon which it was photographed. The court will take judicial notice that at that time radio and

television were in an experimental state but were not used generally for the purpose of broadcasting or exhibiting to the public a *motion picture, or a motion picture version*. In fact, even to this day, the science of broadcasting by television what is actually seen upon a motion picture screen is still in an experimental stage. We indulged in a certain amount of conjecture in our opening brief, on page 21 thereof, as to why the parties included in paragraph 1, or paragraph 3, any reference to radio broadcasting or television. The drafter of this contract wanted to be certain that the producer would not be precluded from exhibiting the *motion picture* by any medium which at any time might become a proper or recognized method of exhibiting a picture—and it was for that reason that the contract contains these provisions.

We think it clear that wherever broadcasting rights or privileges pass under the contract, they are only incidental to the main purpose of the contract.

On pages 9 and 10 of appellees' brief, appellees point out that the radio script consisted of twenty-five pages and that the motion picture script consisted of 176 pages, and that the radio broadcast consumed one-half hour and, to use appellees' own language, "the motion picture scenario occupied the best part of two hours." Appellees then assert that by reason of these two factual elements alone, it is obvious that what was broadcast was not an entire play but in fact merely a sketch. In this connection, on page 3 of their brief, appellees make the following statement: "The mere difference in length of the radio broadcast and the motion picture scenario establishes conclusively that the former is but a small part of the latter . . . ."

The fact that the radio performance lasted but one-half hour and the motion picture two hours, and that the radio script consisted of but twenty-five pages while the motion picture script consisted of 176 pages, is immaterial. The argument in this respect is superficial.

The *radio script* is written in close formation. The names of the characters delivering the dialogue appear upon the same lines with the actual words to be delivered. The radio script contains few, if any, directions to the actors, the director or the photographer—and there are of course no directions concerning scenic, prop or stage setting facilities, and few, if any, musical directions. The *motion picture script* is written in the loosest formation, with the dialogue literally spread in some points in the script over a space ranging from three to ten times the space consumed for the same dialogue in the radio script. The name of each character delivering each bit of dialogue in the motion picture script appears in bold, large type upon a separate line, following which the dialogue itself appears. This arrangement alone, when considered in the light of the fact that double spacing appears above and below the name of each character, consumes some fifteen to twenty per cent of the total space occupied by the motion picture transcript. The motion picture script is replete with directions for stage settings, props and stage scenery, and directions to the director and photographer and to the actors, as well as directions regarding incidental music. This phase of the motion picture script alone consumes a very substantial portion of the total number of pages in the entire script.

It is these differences in the form of the two papers upon which the scripts are written that cause the difference in the length of the scripts.

Conceivably, the literary construction of the two scripts might have been reversed, that is to say, the radio script might have been written in the loose formation and the motion picture script in the compact formation, and in that event it would have been the radio script and not the motion picture script which would have occupied the greater number of pages. We call the court's attention to that possibility only to illustrate the fallacy of appellees' argument—and if the forms had been reversed we feel quite certain that appellees would not so quickly have made the argument that the number of pages alone has any bearing upon whether the broadcast was a complete play or was merely a sketch.

Further, in this connection—but now with reference to the difference in the time consumed in the performance of the two adaptations—if this court will take the time to read both scripts, it will conclusively appear that, eliminating the directions contained in both scripts, it will take only slightly more time to read the motion picture script than it will to read the radio script.

We wish also to point out to the court that in the actual projection of the film upon the screen, in the exhibition of a motion picture, lengthy screen credits are thrown upon the screen prior to the actual exhibition of the picture itself. Much time, in the course of the showing of a motion picture, is devoted to the portrayal of artistic and beautiful photographic scenes and the introduction of elaborate, incidental music. These elements are all lacking, not only in radio broadcasting generally but the radio script here involved will show that such elements are particularly lacking in this radio broadcast.

For the foregoing reasons, it is here contended that appellees' argument that either the number of pages or

the number of minutes involved in either or both of the performances, both of which elements have been so emphatically stressed by appellees, throw absolutely no light whatsoever on whether the play that was broadcast was merely a sketch or a complete play.

We insist that the only proper method of determining this point is to read and examine both scripts carefully. Such an examination will show, as pointed out in appellant's opening brief, that the two exhibitions started with the same sequence, ended with the same sequence, and practically all, if not all, of the intervening sequences are identical. The only difference between the two presentations was such as was made necessary by reason of the differences in the exhibition facilities of the two media.

It is for these reasons that in our opening brief we urged that there were in fact three versions, rather than just two, and we here repeat that in our opinion what was broadcast was not a sketch of a motion picture play, nor was it a broadcast of the motion picture version, but was in fact a broadcast of an entire play, to wit: the radio version of the original manuscript. The fact that the broadcast followed the motion picture version or was copied from the paper upon which the motion picture script was written no more classifies the broadcast as a broadcast of the motion picture version than it does the broadcast of the original dramatic version. All of the elements strictly belonging to the motion picture version were lacking in the version that was broadcast. The only thing that remained was the original story and the dialogue—and that obviously was lifted from the dramatic work itself. The mere intervening agency of a motion picture script does not provide an escape from this conclusion. Things equal to the same thing are equal to each other.

In our opening brief, we commented upon the effect of the general language of the contract as throwing light upon the intent of the parties. On page 9 of appellees' brief an effort is made to answer those arguments. In this connection, appellees state, "The best and simplest answer to this argument *is that if*, as we have argued heretofore, what was done by the appellees was to broadcast a sketch of the motion picture version, the appellant's warranty includes any loss, . . ." To use appellees' language, it *is* the simplest answer *if* what was done by appellees was permitted under the contract, but that is the principal question before this court and appellees here, as in other parts of their brief, have begged the question by assuming that their premise is correct and, accordingly, their conclusion must be correct. We insist that the premise is wrong and that therefore the conclusion is likewise wrong.

Appellees have not even attempted to answer certain of the arguments which have been presented to the court in appellant's opening brief. A reading of the two briefs will disclose the respects in which appellees have failed along those lines. We wish, however, to call the court's attention at this time to one point which, in our opinion, is a very important point, that is, that no explanation or reply appears in appellees' brief to that portion of appellant's argument, appearing on page 21 thereof, wherein appellant expressed his opinion as to the real reason for which paragraph 3 was included in the contract.

**Appellant's Reply to Section in Appellees' Brief Entitled "The Trial Court Did Not Err in Denying Appellant the Right to Introduce as Evidence in the Case Plaintiff's Exhibit 1 for Identification."**

We ask the court to read Plaintiff's Exhibit 1 for Identification. Such a reading will conclusively show the language used by appellee Columbia Pictures Corporation in its printed form of contract by which it intended to acquire full radio rights to a dramatic work. The fact that the record does not disclose whether such contract was not used before or after the time of the execution of the license agreement is immaterial. The simplest answer to appellees' argument is that at "one time or another" a contract, of which Exhibit 1 for Identification is a copy, was used by Columbia Pictures when it intended to acquire general broadcasting rights. It throws light upon the emphasis which Columbia Pictures itself intended to place upon the language used in the license agreement. It was proper evidence for the court to receive in interpreting the contract—and in refusing to permit the introduction of that document in evidence, the trial court committed prejudicial and reversible error.

It is respectfully submitted, therefore, that the judgment of the trial court should be reversed and, as requested in appellant's opening brief, judgment should be entered in favor of appellant for his costs, and this court should remand the cause to the trial court for the sole question of determining the issue of damages.

Respectfully submitted,

LOEWENTHAL & ELIAS and

J. ROBERT ARKUSH,

By J. ROBERT ARKUSH,

*Attorneys for Appellant.*

Dated: June 25, 1945.









